87 - 1147

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation,

Petitioner,

v.

UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS THIRD JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether Respondents' claim that Petitioner's zoning ordinance was unconstitutional is ripe for decision by the courts.
2. Whether Petitioner's zoning ordinance is unconstitutionally vague under the Fourteenth Amendment.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, and Respondents, UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership.

Also, parties to the proceedings below were JOHN A. NOWAKOWSKI, SHIRLEY M. NOWAKOWSKI, MARTHA ANN PARDUHN, HENRY CIALDELLA, TERRY TER HAAR, NANCY TER HAAR, CHARLES CROCKER, and ARLENE CROCKER, who were Intervenors aligned with the VILLAGE OF NEW LENOX, as defendants in opposing the special use permit and development proposed by Respondents.

Union National Bank of Joliet has, since the pendency of this litigation, merged into First Midwest Bank/Illinois. However, the trust agreement remains the same and is now known as Union National Bank and Trust Company of Joliet, now known as First Midwest Bank/Illinois, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963.

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IN THE

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OCTOBER TERM, 1987

VILLAGE OF NEW LENOX,
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v.

UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS THIRD JUDICIAL DISTRICT

OPINIONS BELOW

The decision of the Appellate Court of Illinois, Third Judicial District, is reported at 152 Ill. App. 3d 919, 505 N.E.2d 255, 105 Ill. Dec. 875 (3rd Dist. 1987), and is set out in the Appendix at A-1. The order denying a petition for rehearing is set forth in the Appendix at B-1. The order of the Supreme Court of Illinois denying leave

to appeal is set out in the Appendix at C-1. The trial court's final judgment order, after trial on counts one, two and three of Respondents' complaint, is set out in the Appendix at D-1. The trial court's order which granted Petitioner's motion for summary judgment on Count IV and denied Respondents' motion for summary judgment, from a docket entry on the Judge's Docket, is set out in the Appendix at E-1.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3). The judgment of the Appellate Court of Illinois was entered on January 28, 1987, and is set forth in the Appendix at A-1. The order of the Supreme Court of Illinois denying leave to appeal was entered on October 7, 1987, and is set out in the Appendix at B-1.

CONSTITUTIONAL PROVISION

The United States Constitution, Fourteenth Amendment, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE PROVISION

The Municipal Code of New Lenox, Illinois, 1981. Pertinent portions of the challenged zoning ordinance are cited verbatim in Appendix L.

STATEMENT OF THE CASE

This case stems from Petitioner's denial of a special use permit application by Respondents. After public hearings and a recommendation for denial of the application from the New Lenox Plan Commission the Petitioner's legislative body, the board of trustees, denied the Respondents' application.

Respondents own certain real estate within Petitioner's municipal boundaries. This real estate is zoned I-1 Limited Industrial District by the zoning ordinance found in Petitioner's municipal code. App. L. Pursuant to the zoning ordinance industrial uses in the I-1 district must be conducted wholly within enclosed buildings.

On July 12, 1984, Respondents filed a special use application with Petitioner for the purpose of constructing and operating an asphalt plant on the property located in the I-1 district. Pursuant to the procedures set forth in Petitioner's zoning ordinance various public hearings on the application were held before the New Lenox Plan Commission. The New Lenox Plan Commission made its recommendation to the board of trustees that Respondents' special use application be denied. Subsequently, on January 16, 1985 the board of trustees denied the application.

On February 19, 1985, Respondents filed a three count complaint seeking an injunction against enforcement of the zoning ordinance on the subject property for the proposed asphalt plant. App. F. The allegations in the complaint centered around the denial of the special use application, attacked the board of trustees' action as being arbitrary and capricious and further attacked the provisions as being unconstitutional as applied. Subsequently, Respondents amended the complaint by adding Count IV. App. G. The allegations contained in this count relate to an alleged refusal by the Petitioner and its building commissioner to issue a building permit for the construction and operation of an asphalt plant. App. G-3. This new count also alleged a special use permit application was made to and denied by Petitioner. App. G-3. Count IV further alleged the zoning ordinance was unconstitutionally vague and was an unlawful delegation of legislative power to the building commissioner. App. G-6.

Respondents filed a motion for summary judgment as to Count IV only on October 8, 1985. This motion specifically alleged the denial of a building permit by Petitioner's building commissioner "on or about July 12, 1984". App. I-2. After Petitioner filed its response to the motion (App. K) and its own motion for summary judgment (App. J), and arguments on the matter were heard, the trial court denied Respondents' motion and granted Petitioner's motion. App. E.

A two week trial was held on the remaining three counts. On January 7, 1986, the trial court rendered its judgment order. App. D.

HOW THE FEDERAL QUESTION WAS PRESENTED

After the trial court's final judgment order was entered, Petitioner appealed the verdict on Counts I through III to the Appellate Court of Illinois, Third District. At that time, Respondents also cross-appealed the denial of their motion for summary judgment by the trial court.

Rather than decide the case on the merits of the two week trial the Appellate Court of Illinois, Third District decided that Respondents were entitled to summary judgment on the constitutional issue raised in Count IV. App. A. In so doing the lower court noted "[c]ount IV of the plaintiffs' [Respondents herein] complaint attacked the constitutionality of the village's zoning ordinance as it applies to the plaintiffs' property." App. A-3. The Appellate Court of Illinois, Third District held the ordinance to be unconstitutionally vague. The basis of the holding was that an ordinary person exercising ordinary common sense would have to guess at the ordinance's meaning and that the ordinance unconstitutionally delegated legislative power to the village board of trustees.

Nowhere in its decision did the Appellate Court of Illinois, Third District, address the issues raised in Petitioner's response and own motion for summary judgment that no building permit application was ever filed with Petitioner by Respondents and that Respondents failed to exhaust the available administrative remedies in the zoning ordinance. Furthermore, the Appellate Court of Illinois, Third District, misapplied the relevant case law cited from *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973). The lower court also ignored the argument that the building commissioner was not dele-

gated the unfettered power to determine permitted uses under the zoning provisions for the I-1 district. Instead the court held Petitioner's legislative body, the village board of trustees, was improperly delegated that power.

Thus, Respondents' arguments made under the guise of constitutional protection through the Fourteenth Amendment were not only decided in a vacuum, but misread and misapplied by the Appellate Court of Illinois, Third District.

REASONS FOR GRANTING THE WRIT

I.

RESPONDENTS' CONSTITUTIONAL CLAIMS, AS DECIDED BY THE APPELLATE COURT OF ILLINOIS, ARE NOT RIPE FOR DECISION.

The Appellate Court of Illinois, Third District's opinion that Petitioner's zoning ordinance is unconstitutionally vague failed to determine whether or not Respondents presented an issue ripe for decision by the courts. This Court has steadfastly refused to address claims not yet ripe. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), on remand, 779 F.2d 50 (6th Cir. 1985); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). The rationale for this requirement is to enable the Court to determine the effect of the regulations after the government decision makers have interpreted them.

In Count IV of their complaint Respondents claim that a building permit application was denied by the building

commissioner. App. G-3. Assuming, for the sake of argument, that this allegation was true Respondents failed to appeal that denial as provided for in the zoning ordinance at section 10-12-4(C) (App. L-18) and section 10-12-7(B) (App. L-20). A decision by the zoning board of appeals, rendered after a hearing, is a final administrative determination which is subject to judicial review pursuant to the Illinois Administrative Review Law (Ill. Rev. Stat. 1985, ch. 110, par. 3-101 *et seq.*). App. L-20 - L-21; App. M. There is no allegation, let alone any evidence, that Respondents followed the remedial procedures available through the statutory procedures of the State of Illinois and Petitioner's zoning ordinance. Petitioner's response to Respondents' motion for summary judgment and its own motion for summary judgment make this very clear. App. J; App. K. Also, Petitioner's answer to Count IV denied any building permit application was ever made. App. H.

Nonetheless, Respondents never refuted this point in their motion for summary judgment before the trial court and the Appellate Court of Illinois, Third District never addressed this point. This case cannot be considered a general constitutional challenge to the validity of Petitioner's I-1 zoning provisions as was the case in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The lower court did not consider Respondents' claim to be a general constitutional challenge stating that Respondents attacked the zoning ordinance "as it applies" to the property. App. A-3. A review of the ordinance provisions in question shows that it does not generally exclude all "industrial establishments" as was the case in *Euclid*, 272 U.S. at 388, 47 S.Ct. at 118. Further, review of Respondents' pleadings in the trial court makes it clear that the cause of action is predicated upon, and is a challenge of, the alleged vague-

ness of the I-1 zoning provisions as applied to the property upon which construction and operation of an asphalt plant is proposed.

In rendering its opinion that Petitioner's zoning ordinance was unconstitutionally vague, the Appellate Court of Illinois violated an important rule of constitutional construction. That is, never to anticipate a question of constitutional law in advance of the necessity of deciding it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration*, 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899 (1885). In this case, the constitutional issue was not ripe for review and the lower court erred when it did so.

II.

THE APPELLATE COURT OF ILLINOIS' DECISION THAT PETITIONER'S ORDINANCE IS UNCONSTITUTIONALLY VAGUE IS CONTRARY TO THE DECISIONS OF THIS COURT.

The Appellate Court of Illinois, Third District relied on *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 413 L.Ed.2d 830 (1973), in stating that "[a]n ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning." App. A-5. In so doing the lower court indicated that an "ordinary person exercising ordinary common sense" would have to guess whether an asphalt plant is a permitted use, special use or prohibited use under the applicable zoning ordinance. App. A-5.

Any statute or ordinance which prescribes certain conduct must be sufficiently definite to "give a person of ordinary intelligence fair notice that his contemplated con-

duct is forbidden by the statute." *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir. 1980), citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971). As this Court noted in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1971), mathematical certainty is not expected from an ordinance, it need only give fair warning of the conduct prescribed in light of common understanding. 408 U.S. at 110, 92 S.Ct. at 2300.

When analyzed in the context of this Court's pronouncements, and those found elsewhere, it is clear that Petitioner's zoning ordinance is not unconstitutionally vague as applied to Respondents' property and proposed use. Contrary to the Appellate Court of Illinois, Third District's assertion, a person of ordinary intelligence can easily determine what conduct is needed in relation to Respondents' proposal and what category an asphalt plant falls in. As with the zoning resolutions in *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521 (S.D. Ohio 1984), the zoning provisions in this case "by their very nature, put persons on notice that there are restrictions on the uses to which land can be put." 591 F. Supp. at 529.

The lower court erred in its analysis and appeared to be dictating mathematical precision when it noted that the lists of uses in the I-1 provision were "not comprehensive" and were "incomplete." By looking at section 10-6-2-2(A)(1) (App. L-2) a person of ordinary intelligence can see that permitted industrial uses must be of the types of activities ("such as") listed. Furthermore, the types of permitted industrial uses are "not limited to" the activities listed in that section. The salient proviso in section 10-6-2-2(A)(1) is that the permitted industrial types of activities, both listed and "such as" those listed, must "be conducted wholly within enclosed buildings." App. L-2.

Thus, if an industrial activity cannot be conducted wholly within an enclosed building it is not a permitted use under section 10-6-2-2(A)(1). This reasoning would apply to Respondents' proposed asphalt plant use.

The zoning provisions at issue provide for special uses that are similar and compatible to the permitted uses. App. L-4. Since an asphalt plant involves an industrial type activity with manufacturing, processing and storage of material, all listed activities, a person of ordinary intelligence could determine that such a use might be similar and compatible to the permitted uses with the exception that it is not conducted wholly within enclosed buildings. If an asphalt plant use was authorized by a special use permit it would not fall within the prohibited uses as stated in section 10-6-2-6. App. L-6. These zoning restrictions are considered in the context of the general purpose stated in section 10-6-1 (App. L-1) and description of the I-1 district in section 10-6-2-1 (App. L-1). Given this context the ordinance gives "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. at 113, 92 S.Ct. at 2301, citing *American Communication Assn. v. Douds*, 339 U.S. 392, 412, 70 S.Ct. 674, 691, 94 L.Ed.2d 925 (1950).

Statutes and ordinances should not be automatically invalidated, as the lower court did here, simply because there may arguably be some difficulty in determining whether certain conduct or activities fall within their language. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963). A business person of ordinary intelligence, such as Respondents, should know what activities are encompassed by an ordinance as a "matter of ordinary commercial knowledge or by making a reasonable investigation" (*McGowan v. Mary-*

land, 366 U.S. 420, 428, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961)) or by resort to an administrative process (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982)). In the case at bar Respondents exercised their "commercial knowledge" and applied for a special use permit pursuant to Petitioner's zoning ordinance.

Certainly, in this case it cannot be denied the ordinance did not provide "fair notice" to Respondents. Respondents' pleadings in Counts I, II and III show clearly they were able to determine what was needed to place an asphalt plant on their property (see, App. F), applied for a special use permit and participated in public hearings on the application. This was conducted pursuant to the procedures set forth in the ordinance at section 10-12-8 (see, App. L-21).

It is clear that the ordinance in question provides an opportunity to know what is prohibited so that a person may "steer between the lawful and unlawful." *Grayned v. City of Rockford*, 408 U.S. at 109, 92 S.Ct. at 2298. To avoid arbitrary and discriminatory enforcement, laws must provide explicit standards for those who are delegated to apply them. 408 U.S. at 109-110, 92 S.Ct. at 2299. In Illinois zoning is considered to be primarily a legislative function. *Cosmopolitan National Bank v. County of Cook*, 103 Ill. 2d 302, 469 N.E.2d 183, 82 Ill. Dec. 649 (1984); *LaSalle National Bank v. County of Lake*, 27 Ill. App. 3d 10, 325 N.E.2d 105 (2nd Dist. 1975). Thus, in the context of this case Petitioner's board of trustees is vested with the power to grant or deny a special use permit application. App. L-16. The standards followed by the board of trustees are found in the I-1 provisions and in section 10-12-8 (App. L-21 - L-24). There is no delegation of this

authority to any municipal officer and thus, no unlawful delegation of legislative power.

The Appellate Court of Illinois has required mathematical precision when it states that certain lists of uses in the ordinance are not "comprehensive" or are "incomplete." Zoning is the predominant technique by which municipal governments can exercise some control over private property. *Stansberry v. Holmes*, 613 F.2d at 1288. This Court has long noted that land use regulations promote "values [which] are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed.2d 27 (1954). The lower court's opinion has eroded the flexibility with which the legislative bodies of local municipalities may act in zoning matters. Precision in listing permitted and prohibited uses will destroy the ability of those bodies to promote the general welfare of the public through land use regulations. The nature of the special use technique in these regulations necessitates that an independent determination be made that a proposed use will be compatible with the surrounding area.

Even if the ordinance were construed so as to completely prohibit a use such as an asphalt plant this would not, of itself, render the ordinance unconstitutional. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). This Court should reject the lower court's decision which casts a cloud on the ability of all local municipalities to implement zoning regulations in a constitutionally acceptable manner.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Third District.

Respectfully submitted,

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Respondents.

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APPENDIX A

[Dated January 28, 1987]

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

No. 3-86-0072

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs-Appellees,
Cross-Appellants,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant,

and

JOHN A. NOWAKOWSKI, SHIRLEY M. NOWAKOWSKI, MARTHA ANN PARDUHN, HENRY CIALDELLA, TERRY TER HAAR, NANCY TER HAAR, CHARLES CROCKER and ARLENE CROCKER,

Intervening Defendants-Appellants,
Cross-Appellees.

Appeal from the Circuit Court of Will County
Honorable Herman S. Haase, Presiding Judge

Consolidated With No. 3-86-0074

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs-Appellees,
Cross-Appellants,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant-Appellant,
Cross-Appellee,

and

JOHN A. NOWAKOWSKI, SHIRLEY M. NOWAKOWSKI, MARTHA ANN PARDUHN, HENRY CIALDELLA, TERRY TER HAAR, NANCY TER HAAR, CHARLES CROCKER and ARLENE CROCKER,

Intervening Defendants.

Appeal from the Circuit Court of Will County
Honorable Herman S. Haase, Presiding Judge

Mr. JUSTICE HEIPLE delivered the Opinion of the Court:

The plaintiff, Union National Bank & Trust Company, a land trustee, is the owner of a 52 acre tract of land in the village of New Lenox. The entire beneficial interest of the land trust is owned by the plaintiff Ferro Brothers, an Illinois general partnership. The triangular-shaped tract is bounded by an abandoned railroad right-of-way on the north, a roadway to the west which has been designated

for truck traffic, and Interstate 80 to the south. The village has in effect a zoning ordinance under which the plaintiffs' land is zoned for limited industrial use. Desiring to use the easternmost 10 acres of the tract for an asphalt plant—a use the plaintiffs did not believe was permitted under the zoning ordinance—the Ferro Brothers applied to the village for a special use permit. The village denied the application.

The plaintiffs brought suit for declaratory and injunctive relief against the village asking the court to declare the zoning ordinance invalid and void insofar as it relates to their property. Plaintiffs also sought to enjoin the village from interfering with the development and use of the property as an asphalt plant. Several people living in a residential area approximately 2,000 feet from the site of the proposed use intervened in this matter. By amended complaint, the plaintiffs added a fourth count which sought a declaratory judgment that the zoning ordinance is unconstitutionally vague and unconstitutionally delegates legislative authority to a village employee. The plaintiff moved for summary judgment as to Count IV, and the village responded by a cross motion for summary judgment. The plaintiffs' motion was denied and the defendant's motion was granted.

After a bench trial, the judge ruled in favor of the plaintiffs. The defendant appealed, and the plaintiffs' cross-appealed the denial of their motion for summary judgment as to Count IV of their complaint. We believe that the plaintiffs were entitled to an award of a summary judgment on the constitutional issue raised in Count IV and we so order.

Count IV of the plaintiffs' complaint attacked the constitutionality of the village's zoning ordinance as it applies to the plaintiffs' property. The basis of the attack is that the language of the ordinance is unconstitutionally vague. The pertinent portion of the zoning ordinance of the village provides:

"10-6-2: I-1 LIMITED INDUSTRIAL DISTRICT:

* * *

10-6-2-2: USES PERMITTED: No land shall be used or occupied and no building, structure or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Title, for other than one or more of the following specified uses:

A. Industrial type uses, *such as but not limited to*:

1. All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.

2. Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

3. Printing, publishing or lithography establishments.

4. Railroad freight yards.

(Emphasis added.)

* * *

10-6-2-3: SPECIAL USES PERMITTED: The following uses shall be permitted only if specifically authorized by the Zoning Board of Appeals as allowed in Chapter 12 of this Title:

A. Similar and compatible uses to those allowed as 'permitted uses' in this District.

B. Drive-in banking facilities.

C. Planned unit development.

D. Residence of the proprietor, caretaker or watchman, when located on the premises of the commercial or industrial use.

E. Radio and television towers.

F. Filling of holes, pits or lowlands with noncombustible material free from refuse and/or food wastes.

G. Mining, loading and hauling of sand, gravel, topsoil or other aggregate or minerals, including equipment, buildings or structures for screening, crushing, mixing, washing or storage * * *.

* * *

10-6-2-6: PROHIBITED USES: All uses not expressly authorized in Sections 10-6-2-2, 10-6-2-3 * * *, of this Chapter, *including but not limited to*:

A. Residential uses, except as a special use.
B. Drive-in restaurants.
C. Wrecking, dismantling or automotive salvage yard."

(Emphasis added.)

An ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning. (*Broadrick v. Oklahoma* (1973), 413 U.S. 601, 37 L. Ed.2d 830, 93 S.Ct. 2908; *Redemske v. Village of Romeoville* (3rd Dist., 1980), 85 Ill. App. 3d 286, 406 N.E.2d 602.) In other words, the ordinary person must be capable of appreciating, from the language of the ordinance or statute, how he will be affected by its operation. 85 Ill. App. 3d 286.

We find that the ordinary person exercising ordinary common sense would have to guess as to whether an asphalt plant is a permitted, special or prohibited use under the ordinance. An asphalt plant is not specifically named as a permitted, prohibited or special use. But, whether an asphalt plant might fit into one of the categories is uncertain because the list of permitted and prohibited uses is not comprehensive as evidenced by the language "but not limited to" in both the permitted and prohibited use categories. The situation is further confounded when one attempts to comprehend whether an asphalt plant would fall under the special use section. Part A of that section allows for a special use permit if the proposed use is a similar and compatible use to those allowed as permitted uses. No one could tell what is similar and compatible to an incomplete list of permitted uses. Therefore, we agree that the ordinance is unconstitutionally vague.

We also note that the ordinance is unconstitutionally vague because it does not prescribe any standards or criteria upon which the village can determine whether a proposed use, that is not specifically listed, is permitted, prohibited

or special. For example, in the plaintiffs' case, they applied to the village board of trustees for a special use permit according to section 10-12-3(B)(2) of the ordinance. The ordinance provides that a proposed use shall be given a special use permit if it is a "[s]imilar and compatible" use to those allowed as permitted uses. (Sec. 10-6-2-3(A).) As has already been discussed, the list of permitted uses is incomplete, and there are no rules, requirements or guidelines in the ordinance for determining what might be included as a permitted use. It was therefore within the sole discretion of the village board of trustees to decide whether plaintiffs' proposed use was a similar and compatible use to those allowed as permitted uses.

> "[A] law vesting discretionary power in an administrative officer without properly defining the terms under which his discretion is to be exercised is void as an unlawful delegation of legislative power. [Citations]" (*Krol v. County of Will* (1968), 38 Ill. 2d 587.

Therefore, we also find that the ordinance unconstitutionally delegates legislative power to the village board of trustees.

For the above reasons, and based on the cross appeal, we reverse the decision of the trial court which denied the plaintiffs' motion for summary judgment and we grant the plaintiffs' motion for summary judgment and direct the entry of judgment thereon. Based on the foregoing, we need not address the arguments raised by the defendants in their appeal. Accordingly, albeit for a different reason and rationale than that relied on by the trial court, we affirm the bottom line order of the trial court. That is to say, we affirm the trial court's entry of a judgment in favor of the plaintiffs.

AFFIRMED.

BARRY, P.J. and WOMBACHER, J., concur.

APPENDIX B

(Letterhead Of)

THE APPELLATE COURT
THIRD DISTRICT, STATE OF ILLINOIS

Be it Remembered, That, to wit: On the 3rd day of April, 1987, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-86-0072 (Cons. with 3-86-0074)

Union National Bank & Trust Company
of Joliet, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

vs.

APPEAL FROM:
Will County
Hon. Herman Haase
85 CH 116

Village of New Lenox,
Defendant-Appellant,
Cross-Appellee,

and

John A. Nowakaowski, et al.,
Intervening-Defendants-Appellants,
Cross-Appellees

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Douglas F. Spesia, Neil T. Goltermann & Thomas R. Wilson herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ JOSEPH FENNESSEY
Clerk of the Appellate Court

APPENDIX C

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

October 7, 1987

Mr. Douglas F. Spesia
Murphy, Timm, Lennon, Spesia
& Ayers
Five East Van Buren St.
Joliet, IL 60431

No. 65222 — Union National Bank and Trust Company of Joliet, as Trustee, etc., et al., respondents, v. Village of New Lenox, etc., et al., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1987.

APPENDIX D

[Dated January 7, 1986]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant,

and

JOHN A. NOWAKOWSKI, SHIRLEY M. NOWAKOWSKI, MARTHA ANN PARDUHN, HENRY CIALDELLA, SHIRLEY CIALDELLA, TERRY TER HAAR, NANCY TER HAAR, CHARLES CROCKER and ARLENE CROCKER,

Intervening Defendants.

JUDGMENT ORDER

THIS CAUSE comes on for pronouncement and renditions of decision, the Court having taken this matter under advisement since yesterday. All the parties are represented by counsel; the Plaintiff is present in person and by his attorney, DONALD L. WENNLUND; the Defendant, VILLAGE OF NEW LENOX, is present by its attorneys, Douglas Spesia and Patricia Schnieder, the Defendant Intervenors are present by their attorney, Thomas Wilson.

This case was a difficult one for the Court. It was obviously hotly contested by all parties, and ably presented to the Court. I think, first of all, it is important to discuss the context of a case like this. Perhaps a little background is worthwhile. And I think especially so that we understand what we are doing. In our system of government, for the entire history of this country, we have had a strong basis of private property; people own private property, it's been recognized that this is viable and helpful to our economy, and people own and develop their own property, and can generally, historically, make whatever use they want of their own property. That is a very important factor in our society, and continues to be so at this time.

Balanced against that is the need of the public to be protected in what we call the public health, safety, welfare and morals. Over the years there has been a growing list of government regulations that do prevent individuals from making the use they would like to make of their property. In frontier times, these were very minimal; over the years, we have had zoning regulations, comprehensive plans, EPA Standards, OSHA Standards, and all kinds of things that do regulate; and where we regulate, we say we do it for the public health, safety and welfare. So in any decision like this, the Court is in a position somewhat of balancing these two countervailing philosophies, or standards.

Now, very clearly, the Court is not in the position of zoning property. The Courts do not zone property, municipalities zone property. We are not a municipal body, and I clearly understand that. We only invalidate the public body's decision, if it bears no substantial relationship to the public health, safety or welfare.

I was especially impressed with the sincerity of what I call the two protagonists in this litigation, Mr. Peter Ferro, Jr., a long-term businessman in this community. The record shows that he was born and raised in the community adjacent to this site, lived in the Cherry Hill Subdivision. He is a local businessman of substance; he has made a substantial investment in the subject property. He plans to make an even more substantial investment, and the Court would find to the tune of approximately $2 million in the asphalt plant and related equipment. I was impressed with him as a witness, and one of the things that we, as trial judges are supposed to do, is evaluate the witnesses, judge their credibility. Mr. Ferro, to me, was a very credible witness. I was impressed with his sincerity and honesty, and he came across very well. At the same time, I was very impressed with the sincerity and concern shown by Mr. Nowakowski and Mrs. Pardoon, the other protagonists in this litigation, who were the property owners, that testified in the case. Mr. Nowakowski, being an engineer, had substantial experience with engineering as well as with asphalt plants particularly. And was certainly, I thought, a very honest and sincere witness; and when he didn't know the answer to something, he was clear to say that he didn't. And the Court was impressed with that.

Now, after the Court had heard all the testimony, that spanned the better parts of three weeks, the Court, yesterday afternoon, viewed the exhibits that were presented, and, of course, they were numerous. Very nice graphic displays in terms of the maps, with overlays, which were presented. But in looking at those and the series of photographs of the site, the Court was concerned with the fact that all these views were basically aerial or overviews,

and the Court had a little difficulty in trying to assess exactly what it would be like to be on this site, by this site, what is this really like. Having been in the community for some 15 years, I am, of course, familiar with New Lenox, even though I don't reside there. And I am familiar generally with where this is located. And I took it upon myself to do something, which obviously has some element of risk, in which Appellate Courts tell us it's the kind of thing you are not supposed to do, but I thought that I would do it anyway, since it was up to me to decide the case, and I wanted to decide it fairly for both sides; so that I took a drive yesterday afternoon and I went by the site, and didn't talk to anyone, didn't interview any persons or anything like that. I just drove past the site, and I will state for the record what I did, so if somebody wants to find fault with that later on, they can, but it is what it is.

I drove on Interstate 80 to New Lenox, got off at the interchange of Route 30, drove west to K-Mart parking lot, which is zoned C-3 on the various charts; got out of my vehicle behind the K-Mart parking lot and stood there and listened to what I could hear. And basically what I heard was a lot of traffic noise on Interstate 80, which is located right adjacent, as well as some truck noise behind the K-Mart. I then drove west on Route 30 to Providence High School parking lot, went into the parking lot, got out of my vehicle in the area of the convent, and again listened to see what I could hear. And basically heard the noise of I-80. I then viewed the Northern Illinois Gas facility at the corner of Gougar Road and Route 30. As I was going down Route 30, I was reminded of the fact that at that location, Route 30 is a four-lane divided pavement, U.S. Highway, relatively heavily traveled. And adjacent to it is a railroad track, which, I believe, and this is not in the record, but I believe it was the old Rock Island Railroad track. In any event, there was a commuter train that did go by while I was there.

I next turned on to Gougar Road and went down Gougar Road and got out of my vehicle at the end of the

Cherry Hill Subdivision at Gougar Road, and across from the Northern Illinois Gas facility. Again, I listened to see what I could hear, and I basically heard traffic on Gougar Road and on I-80. Then I drove my vehicle down to Haven Road, went east on Haven Road to the subdivision in which Mr. Nowakowski lives, Haven Manor, drove to a location in front of Mr. Nowakowski's house, parked my vehicle and got out, and observed what I could see and hear. I heard the high tension lines, which run directly next to Mr. Nowakowski's house. I heard some traffic from I-80. I looked over to the site, through the trees and brush, I was virtually unable to see the site. I will say that it was overcast, but it seemed to me to be clear enough for me to see. I could certainly tell where I-80 was, and it was hard for me to tell exactly where the site was from Mr. Nowakowski's house. Having done that, I repeated my route, went back to the K-Mart parking lot, got out of my vehicle, walked up onto the railroad right-of-way site, and walked onto the site itself. I noticed that an abandoned railroad right-of-way of the Michigan Central contains a lot of trees, brush, somewhat difficult for me to get through this. It's like a thicket. I did get on the site. I noticed that when on the site, the noise from I-80 is very loud, almost deafening. I looked from I-80 back to the K-Mart site. I was able to see the K-Mart through the brush, from the site; I looked toward the Providence High School site from the proposed asphalt plant site and was really unable to see the Providence High School site.

I then went back to Mr. Nowakowski's house, walked onto the Commonwealth Edison right-of-way and did get right next to the industrial parcel adjoining the Commonwealth Edison right-of-way, and attempted again to try to see the site from there. And I guess I could tell partially where it was, and perhaps if there were some tanks on there, I could possibly see it. Again, I did this just to have a little better feeling for what this site looked like.

The thing that was nost noticeable to me, getting out of my vehicle at numerous occasions, is that one hears

at all of the above locations I mentioned the traffic from Interstate 80. It is a pervasive factor to the area, and the Court would find, based on the testimony in this case, that the fact that Interstate 80 bisects the industrial property in this area is certainly a very major factor and really contributes to the character of the property in this entire area. As does the interchange of I-80 with Route 30. Obviously this has a very substantial effect on these subject parcels.

Now, I have also looked at all the exhibits, read the comprehensive plan of the Village of New Lenox, read all the cases presented, and read the zoning ordinance of the Village of New Lenox. In cases such as this, there are eight standards, and we talk about them at the La-Salle National Bank Standards, plus the Sinclair Pipeline Standards. These various standards are what the Court must use to make such a decision. Again, the Court is not here to zone property, that is the function of municipalities.

The first standard is what is the existing use and zoning of nearby property? The Court would find that the subject site is not being used for anything other than quasi-agricultural at the present time. But this parcel and the parcel to the west of Gougar Road, and the parcel to the south, are all zoned industrial, I-1, in the Village of New Lenox limited industrial ordinance. The property to the north of the Michigan Central right-of-way, starting at the intersection with Gougar Road, is either zoned industrial, quasi-public, in the case of the high school, commercial in the case of K-Mart. I would say quasi-type industrial use in the Illinois Department of Transportation storage yard, which is on the southeast side of I-80. So that if we take the site itself, and take all of the surrounding parcels of real estate, the Court would find that there are no residential uses which abut this property, that all of the uses, with the exception of the high school, are either industrial, commercial or quasi-governmental. The high school is an existing use that one would like to think of as being in a quieter zone than it is. How-

ever, the location of that high school is so adjacent to Route 30, it is almost on Route 30. One could throw a rock from Route 30 and hit the high school, and it is almost adjacent to the railroad track, that in the opinion of the Court, the effect of Route 30, and the effect of the railroad track on that high school is much more substantial than the effect of the proposed use on this site. So those are the surrounding uses. The Court would also find that the nearest residential uses are the Cherry Hill Subdivision, the closest point of which is at the northwest corner of Route 30 and Gougar Road; and the Haven Manor Subdivision, which is located east of the Commonwealth Edison highline, and south of the abandoned Michigan Central right-of-way. Neither one of those are closer than about 2,000 feet or thereabouts from the subject site.

The Court is also of the opinion that the subject site is buffered from any residential use by Gougar Road, Michigan Central right-of-way and I-80. So that especially with regard to Haven Manor, you have I-80 between the site and Haven Manor, you have the right-of-way of the Commonwealth Edison between the site and Haven Manor. And it would seek to me that those two factors are the most persuasive factors with regard to Haven Manor Subdivision.

The next factor becomes the extent to which the property values are diminished by the present classification. We must bear in mind that this property is zoned industrial. We are not talking about a situation in which a municipality is attempting to force a residential classification on a piece of property that is obviously not residential. This property is zoned for the most intensive type of use which is allowed in the Village of New Lenox. There has been no showing that the owners of the property, the Ferro Brothers, have attempted to develop this property. Everyone agrees that this is a premiere industrial site, that this is probably the finest industrial property located within the Village of New Lenox; that it is valuable property by anyone's opinion. It does appear that from the testimony that the property would be more valu-

able if the property was allowed to be developed with a drum mix asphalt plant as proposed by the Ferro Brothers, and that the diminution in value, giving the Plaintiff the best of the situation, would be approximately $60,000. But there is no one that has suggested to this Court that this is a valueless piece of property without a special use permit. Clearly it is a highly valuable piece of industrial property, and the Court is of the opinion that it could well be developed for industrial uses, although Mr. Weitendorf did testify that the industrial market hasn't been real good in this area in the last few years.

With regard to that factor, I think there is a diminution in value, but the property is still very valuable as an industrial site.

Next the factor is the extent to which the destruction of property values promotes the health, safety, morals, and general welfare. In this case, we heard a lot of testimony about such things as particulate emissions, noise, traffic, visual pollution, if you will. Since the Village of New Lenox ordinance requires performance standards which must be met, and since, for this type of facility, the Plaintiff must comply with the Federal Environmental Protection Act, the Illinois Environmental Protection Act, the performance standards of the Village of New Lenox, the Court is of the opinion that based on the testimony, the matters of odor, particulate emission and noise will be all well within the requirements of the various regulatory laws and ordinances. And the Court is of the opinion that the plant that Mr. Ferro proposes, which will be a drum mix-type plant, would be the most modern type of plant to be built. And from the testimony, the Court finds that they could comply with all applicable health, noise, pollution-type of laws.

The two areas in which I think there really is the biggest problem with this proposal deals with traffic. There is no question that there is going to be a great amount of increase in truck traffic during the peak season at this site. And there is no question also that visually, these types of plants are not particularly attractive, because we have

piles of aggregate, we have some silos, and we have some other type of equipment on the site. Visually, I think from looking at the various pictures and the video tape that I viewed, I would have to say they are not the most attractive facilities in the world.

Dealing with those two factors, transportation and visual or asthetic aspect of this site, the Court would find as follows: First of all, that the comprehensive plan of the Village of New Lenox designates Route 30 and Gougar Road as the primary arterial access point for heavy-type traffic. That is the truck route in New Lenox, and as it turns out, trucks would be able to get off the interstate at the intersection, drive on Route 30 and Gougar Road, the only place they would really have to go past a residential subdivision is at the southeast end of the Cherry Hill Subdivision. And that is a problem, however, the Village has designated that as a truck arterial way, or truck route, and there is no question that if any of this property adjacent to Cherry Hill is developed for industrial useage, there is going to be truck traffic on Gougar Road, there is no way to avoid that.

So that while there is going to be come increase in truck traffic, the Court does not view that that would be necessarily any more severe than any other industrial-type use. It may be at periods of time somewhat more intense.

With regard to the visual aspect of it, the site is screened by the trees and brush of the Michigan Central right-of-way, and the Court believes that a substantial portion of the negative visual appearance of the thing will be hidden by the brush and screening, the fence required by the New Lenox ordinance, and that perhaps something more could be done in the way of berming or landscaping the site. Obviously, one will be able to see the silos, but one can certainly see the water tower at the Northern Illinois Gas facility. There are other towers in the area, there are highlines in the area, really hard to see that these silos are that much more horrible than any of the things that are around there. So the Court is of the opinion that while there is always, in such type of facil-

ity, some detriment to the—an effect, let's say, on the public health, safety and morals, the Court is of the opinion that in this case the effect is minimal, and the Court so finds. The Court is of the opinion that with the performance standards of the Village of New Lenox being as rigorous as they are, the Federal EPA and State EPA regulation, with the fact that this is already an industrial site, adjacent to access by the Village-designated truck route, that any effects on the public health, safety, welfare and morals is minimal.

The next factor is the relative gain to the public as compared to the hardship imposed on the property owner. And again, for the reasons that I have just stated, I think the gain to the public in this case is minimal. Any development of industry on the sites, on both sides of Gougar Road and both sides of I-80, are going to increase truck traffic, they are going to be more intensive than what it is there now, and the Court finds that the relative gain to the public is minimal, compared to the hardship imposed on the property owner.

The next factor under the law is, is it suitable for its zoned purposes. This factor, the Court finds, is very much in favor of the Village of New Lenox. The Court finds that this is a suitable site for the zoned purposes. It is an excellent industrial site. All the witnesses have agreed that this is prime and fine industrial property. So the Court finds that that factor weighs in favor of the Village of New Lenox.

The next factor is the length of time the property has been vacant. The property has been vacant as zoned for approximately 20 years. It has been vacant since the ownership of the Ferro Brothers partnership, since 1970. And it has been vacant a long period of time. There is some testimony by Mr. Weitendorf that there is somewhat of a soft demand for industrial property in the area; however, it is also true that there is no showing of any attempt by the Ferro Brothers partnership to develop the property; there has been no attempt to actively market the property, so that the Court is unable to say that this

is a kind of a piece of property that is laying fallow because it's just not suited. The Court just can't find that. The Court does find that it is suited for the zoning classification of industrial. And the Court believes that with proper marketing and development, a development could take place on that site. So that that factor is kind of balanced in between the parties.

The seventh factor is the care which the community has taken to plan. And the Court is of the opinion that the Village of New Lenox has a very excellent comprehensive plan. The evidence in the record in this case shows that they are following their comprehensive plan; that they have given substantial thought to it; that they have one of the finest zoning ordinances and comprehensive plans which the Court has had a privilege to see. And so the Court finds that that factor is very much in favor of the Village of New Lenox.

Final factor is the evidence or lack of evidence of community need. Here we got into a great discussion with how many asphalt plants are within 25 miles of the site. And I don't remember exactly how many there were, but there were a substantial number. It appears that the market for asphalt in the New Lenox area can clearly be satisfied by plants outside of the Village of New Lenox. There does not seem to be any indication that streets in New Lenox are rutted or furroughed because of the fact they can't get any asphalt. And it appears that there are many plants in the area that are not running at capacity. However, there is another important factor, I think, to consider. Ferro Brothers have a need for asphalt; they have a need for asphalt, their own plant, to qualify for state highway contracts, and I think this is primarily the reason that they are proposing this use. The Ferro Brothers are a local company, operating in and about the Joliet, Will County, New Lenox, general area. And they feel that they will use 70 percent of the asphalt on their own projects. So clearly they do have a need; clearly there is no other asphalt plant in the Village of New Lenox, but the Court, if it were really looking at

what the community need as a totality, the Court is unable to find that there is really a community need for an asphalt plant in the area. When we then take these factors and add them up, the Court finds, after doing all that, that we come up with a relatively balanced score, with the Court finding that there were three factors very much in favor of the Village of New Lenox, three of the factors very much in favor of the Ferro Brothers proposal, and two of the factors which kind of cut both ways.

The Court then took a look at the specific proposal and consideration of the special use category of the Village of New Lenox ordinance, which is contained in Section 10-12-8. And therein we have several specific factors. The first factor is whether the proposed use is designated by this title as a special use in the district in which the use is to be located. Now, it is true that if we look at the industrial use classification of the ordinance, we do not find the words, "asphalt plant," mentioned as a use which is permitted. However, we find in Subsection G, under special use in the industrial classification, that there is a category that deals with the hauling, mixing, crushing of aggregates, and that this use is certainly analogous to that, and I think would come under that classification.

The second standard is whether the proposed use will comply with all applicable regulations in the district in which the use is to be located. Based on all the evidence in this case, the Court is of the opinion that the proposed use will comply with all applicable regulations in the district in which it is located.

Third factor under the special use ordinance is the location and size of the proposed use, the nature and intensity of the operation involved in or operated in connection with it, the size of the site in relation to it, and the location of the site with respect to the street giving access to it are such that it will be in harmony with the appropriate and an orderly development of the district in which it is located. In this situation, we have all the property to the west owned by the Ferros. It is all zoned industrial. And there is some question as to whether putting

up an asphalt plant on the property will promote the orderly development of the rest of that district. Mr. Murphy, for one, found it hard to understand why the Ferros would want to do this. I think that was his words, he said, "I can't understand why they would want to do this to such a nice site." Or words to that effect.

There is some evidence that the location of this plant may cause some problems in the further industrial, light or limited industrial-type development, which seems to be primarily proposed under the New Lenox ordinance.

The next factor is the location, nature and height of buildings, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not unreasonably hinder or discourage the appropriate development and use of adjacent lands and buildings. Well, with regard to the sites to the north, they are all being used, and the Court does not believe that the K-Mart or the high school or Northern Illinois Gas, or the Department of Transportation garage, will really be hindered or effected in a substantial manner by the proposed use on this site. Again, it may cause some people to shy away from some of the Ferro Brothers other property, for industrial, light industrial uses, but I suppose maybe that is a risk that Mr. Ferro takes.

The next factor is parking areas will be of adequate size for the particular use. And the Court is of the opinion that because of the type of facility, that there is really no problem with parking.

The next number six, the proposed use will not cause substantial injury to value of other property to the neighborhood. And on balance, considering all of the evidence in the case, the Court is of the opinion that the proposed use will not cause substantial injury to the value of other property in the neighborhood. Especially with regard to residential properties, the Court sees almost no detrimental effect to any of the residential property in the neighborhood.

Taking into consideration all of the factors, the Court is of the opinion that this proposed use can and will comply with all of the regulations of the Village of New Lenox, the Illinois Environmental Protection, the Federal Environmental Protection Agency; the Court is of the opinion that the denial of the special use permit does, at least, at least to the tune of $60,000 lower Mr. Ferro's right to the value and the use and benefit of his property; that there is almost no detrimental effect to the health, safety, morals and welfare by him putting this site up; that in this case, there is no substantial relationship with the Village's denial of the special use permit, to anything which will effectively promote the public health, safety and welfare.

So the ruling of the Court will be to find the issues in favor of the Plaintiff and against the Defendant, Village of New Lenox. And the Court will order than an injunction shall issue against the Village of New Lenox from them doing anything to prevent the Ferro Brothers partnership, the Plaintiffs herein, from developing this property as a drum mix asphalt plant.

The Court will rule that Ferro Brothers must, in all other respects, comply with all reasonable requirements of the Village of New Lenox, with regard to such matters as noise, particulate. Obviously, all the standards. They must comply with all of those, and plus the Court would also rule that the plant shall be a plant of the same type and specifications as that testified. We had everything here except the manufacturer's name, and I don't think that's necessary, but it shall be a drum mix-type plant, not to exceed 365 tons per hour capacity, with a bag house; and that it shall have all the latest noise attenuation devices on it. I think with regard to screening of the site, there is some natural screening on that right-of-way. The ordinance clearly provides for a fence. I think it is also contemplated by the ordinance that further landscaping, berming and screening of the site could be required by the Village of New Lenox. The Court really did not hear much in the way of evidence about any pro-

posed screening or berming, and would think that that is a matter that is best left to the Village authorities of the Village of New Lenox. Obviously, they can't, under the Court's order, require Mr. Ferro to plant his entire 10 acres with trees, and thus deprive him the use of the asphalt plant. But I think the reasonable use of landscaping, perhaps berming and screening to kind of screen this as visually as much as possible could be required by the Village.

So the Court is ruling, basically, that they can have the use for a 365 ton per hour asphalt—drum mix asphalt plant, with a bag house, a noise attenuation device, subject to all other requirements of the Village of New Lenox zoning ordinance.

The Court finds the issues in favor of the Plaintiff, against the Defendants and the interveners, and orders that an injunction shall issue enjoining the Village of New Lenox from interfering with the development and use of this proposed site of a 365 ton per hour drum mix asphalt plant, with bag house and noise attenuation device.

Court rules that said plant must in all other manners comply with all ordinances and laws of the Village of New Lenox.

The Village of New Lenox, together with its officers, officials, employees, servants and agents, is restrained from instituting or maintaining any action through Court or otherwise to block, hinder, impede or frustrate Plaintiffs' use or development of said property.

The Village of New Lenox is hereby commanded and required to issue all necessary incidental and convenient permits for the development or operation of the said property for the uses hereinabove set forth upon compliance with all ordinances and regulations of the Village of New Lenox other than such provisions of Defendant Village of New Lenox Zoning Ordinance which would prohibit the use of Plaintiffs' property for the uses hereinabove described.

The foregoing shall be a final and appealable order from and after its presentation and execution.

This Court shall retain jurisdiction of the cause and of the parties to enforce the provisions of this judgment order.

Date: 1/7/86

ENTER:

/s/ HERMAN S. HAASE
Judge

APPENDIX E

No. 85 CH 116

CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

JUDGE'S DOCKET

Orders of Court

* * * * *

Nov 15 1985 The Plaintiff by Mr. Wennlund. The Defendant by Mr. Goltermann. Court having taken under advisement Motion for Summary Judgment. Motion for Summary Judgment under Count IV is denied. Defendant's Motion under Count IV is granted. Cause to proceed to trial on the remaining Counts only. Motion to Compel Affidavit of Compliance. Mr. Wennlund to comply within 7 days. Motion with regard to certain questions on the depositions, and that is set for November 22, 1985 at 9:30 A.M. JUDGE HAASE

* * * * *

APPENDIX F

[Filed January 19, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

COMPLAINT

COUNT I

NOW COME the Plaintiffs, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership, by its attorneys, Donald L. Wennlund & Associates, and for Count I of its Complaint

against the Defendant, VILLAGE OF NEW LENOX, states as follows:

1. That the Defendant, VILLAGE OF NEW LENOX, is a body politic and corporate duly existing under and by virtue of the Statutes of Illinois.

2. That the Plaintiff, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, was and is now the owner of record of certain property in the Village of New Lenox, Will County, Illinois, located approximately 1,500 feet east of Gougar Road, bounded on the south and east by Interstate Route 80 and on the north by the Michigan Central Railroad and legally described as follows:

> The East 10 acres of the following described property: That part of the West half of Section 17, Township 35 North, Range 11 East of the Third Principal Meridian, New Lenox Township, Will County, Illinois lying Southerly of the Michigan Central Railroad, lying Northerly of F.A.I. Route 80 Highway and except that part previously conveyed to the State of Illinois by Document No. 1013791 and except the North 312 feet of the South 1929.77 feet of the West 743.78 feet of said Section.

and set forth on Exhibit "C" attached hereto and made a part hereof.

3. That the entire beneficial interest of said land trust is owned by Plaintiff, FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership.

4. That there is now in full force and effect in the Village of New Lenox a zoning ordinance passed and approved July 15, 1970, and thereafter amended from time to time, a true and correct copy of the I-1 Industrial District provisions and special use provisions are attached hereto and by reference made a part hereof as Exhibit "A".

5. That under the aforesaid zoning ordinance, the subject property is classified in the I-1 Industrial District with a nonconforming use for mining gravel.

6. That the subject property is triangular in shape, is approximately ten (10) acres in size, is located approximately 1,500 feet east of Gougar Road, and is bounded on the north and east by the Michigan Central Railroad right-of-way and on the south and east by the F.A.I. Route 80 right-of-way with dimensions on the west line of 969.53 feet, along the Michigan Central Railroad right-of-way of 948.86 feet, and along the F.A.I. Route 80 right-of-way of 1023.92 feet, and is screened from surrounding properties by the railroad embankment on the north and east, F.A.I. Route 80 on the south and east, and by being 1500 feet off Gougar Road on the west.

7. That the property immediately west of the subject property is zoned I-1 with a nonconforming use for the mining of gravel.

8. That the property west of the subject property across Gougar Road is zoned I-1 with a nonconforming use for the mining of gravel and is used for the quarrying of gravel.

9. That the property immediately to the north of the subject site and across the railroad right-of-way is zoned C-3 commercial and is used as a K-Mart department store.

10. That the property northwest of the subject property across the railroad right-of-way is zoned C-2 Commercial and is used for a school by Providence High School, and I-1 used by Northern Illinois Gas Company for garage and office space.

11. That the property east of the subject property across the intersection of the railroad right-of-way and the F.A.I. Route 80 right-of-way is zoned C-3 and is used for a State of Illinois Department of Transportation highway garage for equipment and materials and vehicles.

12. That the property south of the subject site across the F.A.I. Route 80 right-of-way is zoned I-1 Industrial and is presently used for farming, all as more particularly set forth on the zoning map attached hereto as "Exhibit B".

13. That the Comprehensive Plan of the Village of New Lenox designates the subject site for industrial uses and Gougar Road is designated as the truck route through and around the Village.

14. That if developed as proposed by Plaintiffs, the subject property would be improved with a plant for the processing and production of asphalt, material storage facilities and an office and garage building, all to be used in the production of asphalt.

15. That the Plaintiffs have been prevented from developing the property, as alleged, by the I-1 Industrial District regulations applied to the subject property and the refusal of the corporate authority of the Village of New Lenox to approve the issuance of a special use permit for an asphalt plant pursuant to Sections 12.10 and following of the New Lenox zoning ordinance then in effect.

16. That Gougar Road is the designated truck route for traffic in New Lenox and its intersection with U.S. Route 30 is immediately north of the subject site, carrying substantial traffic volume, and F.A.I. Route 80 immediately to the east of the subject property, all of which are ideally situated and suited to accommodate the use proposed by the Plaintiffs.

17. That the development of the subject property in the manner sought by Plaintiffs would not, when compared to other uses permitted as a matter of right on the subject property, increase the volume of traffic or contribute to traffic congestion on either of said two arterial streets.

18. That the predominant zoning and use of property fronting on Gougar Road and U.S. Route 30 in the vicinity of the subject property is for commercial and industrial purposes including gravel mining and heavy equipment storage and dispatching.

19. That on July 12, 1984, the Plaintiffs filed an application with the Village of New Lenox for a special use permit authorizing the use of the subject property for the

construction and operation of plant for the production of asphalt.

20. That pursuant to notice published in accordance with law on July 20, 1984, the Plan Commission of the Village of New Lenox on August 6, 1984 and on various continued dates thereafter held public hearings on said application, and thereafter in December of 1984, the Plan Commission recommended to the corporate authorities that the Plaintiffs' application be denied.

21. That on January 16, 1985, the corporate authorities of the Village of New Lenox denied Plaintiffs' application by a vote of six to zero.

22. That by reason of the matters hereinabove set forth in paragraphs 18 through 20, the Plaintiffs have exhausted their administrative remedies.

23. That within the I-1 Industrial District, any of the following uses are permitted as a matter of right:

I. Industrial Type Uses, such as but not limited to:

(a) All manufacturing and industrial activities including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.

(b) Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

(c) Printing, publishing, or lithography establishments.

(d) Railroad freight yards.

II. Wholesale and Warehouse Uses, such as but not limited to:

(a) Direct selling establishments, where products are stored and distributed.

(b) Wholesale and warehouse establishments that deal in commodities which are the product of a use permitted in the 1-1 District.

(c) Wholesale establishment.

(d) Warehouse.

(e) Storage building.

III. Commercial Uses

(a) Service retail businesses, for the convenience of persons and firms in the industrial district such as but not limited to:

(1) Automobile service station

(2) Bank, not including drive-in facilities

(3) Barber shop

(4) Currency Exchange

(5) Delicatessen

(6) Doctor's, surgeon's and/or physician's office

(7) Dry cleaner

(8) Hotel and/or motel

(9) Medical clinic

(10) Meeting hall

(11) Office building

(12) Restaurant

(b) Business establishments

(1) Advertising signs

(2) Automobile diagnostic center

(3) Automobile repair shop

(4) Bottled gas dealer

(5) Bottling works

(6) Building services and supplies

(7) Cartage, express and parcel delivery establishments

(8) Commercial testing laboratory

(9) Contractor's yard

(10) Fuel oil dealer

(11) Furniture repair and reupholstery

(12) Lumber yard

(13) Motor vehicle dealer

(14) Monument works

(15) Tire retreading and repair shop

(16) Truck terminal

IV. Public, Quasi-Public and Governmental Buildings and Facilities, such as but not limited to:

(a) Animal pounds and shelters.

(b) Essential services—gas regulator stations, telephone exchange, electric substation.

(c) Hospital.

(d) Office building.

(e) Public service or municipal garage.

(f) Public utility establishment.

(g) Sewerage treatment plant.

(h) Transit and transportation facilities.

(i) Vocational school.

(j) Water filtration plant.

(k) Water reservoir.

24. That within an I-1 District, the following special uses are permitted:

(a) Similar and Compatible Uses to those allowed as "permitted uses" in this district.

(b) Drive-in banking facilities.

(c) Planned Unit Development.

(d) Residence of the proprietor, caretaker, or watchman, when located on the premises of the commercial or industrial use.

(e) Radio and television towers.

(f) Filling of holes, pits, or lowlands with non-combustible material free from refuse and/or food wastes.

(g) Mining, loading and hauling of sand, gravel, topsoil or other aggregate or minerals, including equipment, buildings or structures for screening, crushing, mixing, washing or storage, provided that:

(1) No open pit or shaft is less than two hundred (200) feet from any public road.

(2) All buildings or structures for the screening, crushing, washing, mixing or storage are located not less than two hundred (200) feet from any property line.

(3) The borders of the property adjacent to any district other than an industrial district are fenced with a solid fence or wall at least six (6) feet in height.

(4) A plan of development of the reclamation of the land is provided as part of the application for special use. The plan of development shall be accompanied by a written agreement between the owner or his agent and the Village of New Lenox, and a performance bond in an amount equal to the cost of the reclamation of the land as set forth in the Development Plan.

25. That the processing, production and manufacture of asphalt is a similar and compatible use to those uses permitted in the I-1 District as a matter of right.

26. That notwithstanding that the property of the Plaintiffs has been zoned industrial for more than 25 years, the same has remained undeveloped and unmarketable, and more than 200 acres of industrial zoned property in the immediate area of the subject property has never been developed or used for industrial purposes, and a definite need exists for such a use as none exists within the entire Township of New Lenox.

27. That by reason of the matters hereinabove set forth, the refusal of the Defendant, VILLAGE OF NEW

LENOX, to approve the Plaintiffs' application for special use permit for construction and operation of a plant for the processing and production of asphalt on the subject property was arbitrary, capricious and unreasonable.

28. That the subject property has been and is unsuitable for the operation and conduct of an asphalt plant. Such use of said property would be compatible with the zoning, use and development of abutting and nearby property, and is the highest and best use of said property.

29. That by virtue of the zoning classification and use of the property abutting upon or in the immediate area of the subject property, the use of the subject property by the Plaintiffs for an asphalt plant as requested by the Plaintiffs would cause no injury to or deterioration of the value of any other property in the area.

30. That the action of the Defendant, VILLAGE OF NEW LENOX, in classifying the subject property in the I-1 Industrial District but prohibiting the use of said property for an asphalt plant is inconsistent with the use and character of the surrounding and abutting property, and bears no real or substantial relationship to the public health, safety, morals and public welfare; deprives Plaintiffs of the highest and best use of their property; destroys the value thereof; confiscates the Plaintiffs' property without due process of law and without benefiting the public thereby; and is arbitrary, capricious, unreasonable, unnecessary, and in violation of the municipal zoning enabling statutes of the State of Illinois, and is, therefore, void and unenforceable.

31. That if the Plaintiffs are not permitted to use the subject property for an asphalt plant as proposed by Plaintiffs, they will suffer a substantial loss in the value of their property without any compensating gain to the public.

32. That by reason of the matters hereinabove set forth, the said zoning ordinance of the VILLAGE OF NEW LENOX, in its application to the said subject property, denied the Plaintiffs due process of law and the equal protection of the laws, and takes their property for public

use without compensation in violation of Sections 2 and 15 of Article I of the Constitution of the State of Illinois, and the Fifth and Fourteenth Amendments to the Constitution of the United States in that by reason of the aforesaid facts and circumstances, Plaintiffs have been and are deprived of the use of the said property for the purpose of constructing and operating an asphalt plant thereon, and that by reason of the arbitrary and capricious restrictions imposed on the subject properly by the said zoning ordinance, the value of the said property has been greatly depreciated.

33. That a dispute has arisen between Plaintiffs and Defendant concerning Plaintiffs' rights and the court should declare the rights of the parties.

34. That the Plaintiffs' property and the rights of Plaintiffs therein, as well as the best interests of the general public, can best be served if the Plaintiffs are permitted to develop the said property with an asphalt plant as proposed by Plaintiffs, and any restrictions which the Defendant might place on the use and development of the said subject property which would prevent the Plaintiffs from developing the said subject property as aforesaid would violate and be contrary to Sections 2 and 15 of Article I of the Constitution of the State of Illinois and the Fifth and Fourteenth Amendments of the Constitution of the United States.

WHEREFORE, Plaintiffs, FERRO BROTHERS PARTNERSHIP, pray as follows:

A. That this Court enter judgment determining and decreeing that the said zoning ordinance of the VILLAGE OF NEW LENOX is invalid and void insofar as it relates to the Plaintiffs' subject property, and prevents the development and use thereof as an asphalt plant in the I-1 Industrial District of the type proposed to be operated and maintained by Plaintiff.

B. That this Court determine and decree that the Plaintiffs and anyone acting through, with and under them shall have the right to use the above-described property for an asphalt plant in the I-1 Industrial District.

C. That this Court issue a writ of injunction restraining the VILLAGE OF NEW LENOX, and its officers, agents and employees from enforcing or endeavoring to enforce the I-1 Industrial District regulations with respect to the said subject property so as to prevent the development and use of said property with an asphalt plant of the type proposed by Plaintiff.

D. That this Court issue a writ of injunction restraining the VILLAGE OF NEW LENOX, its officers, agents and employees from interfering in any manner with the Plaintiffs or any person claiming by, through or under the Plaintiffs in the use and development of the said subject property for an asphalt plant as hereinabove more fully described.

E. That the Plaintiffs have such other and further relief in this matter as the Court deems just or necessary.

COUNT II

NOW COME the Plaintiffs, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership, by their attorneys as aforesaid, and for Count II of their Complaint against the Defendant, VILLAGE OF NEW LENOX, state as follows:

1 through 27. That Plaintiff repeats and realleges Paragraphs 1 through 27 of Count I as Paragraphs 1 through 27, inclusive, of this Count II as if fully set forth herein.

28. That the use and development of the subject property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs will have no more adverse effect or impact on the use, value and enjoyment of the property, or upon the public health, safety and welfare of the residents of the Village of New Lenox than many or all of the uses hereinabove enumerated permitted as a matter of right in the I-1 Industrial District.

29. That the action of the Defendant, VILLAGE OF NEW LENOX, in permitting the uses hereinabove set out

in Paragraph 23 as a matter of right in the I-1 Industrial District, but in excluding an asphalt plant as proposed by Plaintiffs, bears no real or substantial relationship to the public health, safety, morals and public welfare; deprives the Plaintiffs of the highest and best use of their property, destroys the value thereof; confiscates the said Plaintiffs' property without due process of law and without benefiting the public thereby; and is arbitrary, capricious, unnecessary and in violation of the municipal zoning enabling statutes of the State of Illinois, and is, therefore, void and unenforceable.

30 through 33. That Plaintiffs repeat and reallege Paragraphs 31 through 34 of Count I, respectively, as Paragraphs 30 through 33 of this Count II as if fully set forth herein.

WHEREFORE, Plaintiff, FERRO BROTHERS PARTNERSHIP, prays as follows:

A. That this Court enter judgment determining and decreeing the said zoning ordinance of the VILLAGE OF NEW LENOX is invalid insofar as it excludes an asphalt plant of the type proposed by Plaintiff.

B. That this Court determine and decree that the Plaintiffs and anyone acting through, with, or under them shall have the right to use the above-described property for an asphalt plant.

C. That this Court issue a writ of injunction restraining the VILLAGE OF NEW LENOX and its officers, agents and employees from enforcing or endeavoring to enforce the zoning ordinance of the VILLAGE OF NEW LENOX so as to prevent the use of the aforesaid property for an asphalt plant of the type proposed to be maintained and operated by Plaintiff.

D. That this Court issue a writ of injunction restraining the VILLAGE OF NEW LENOX, its officers, agents and employees from interfering in any manner with the Plaintiffs or any person claiming by, through or under the Plaintiffs in the use and development of the said subject property for an asphalt plant as hereinabove more fully described.

E. That the Plaintiffs have such other and further relief in this matter as the Court deems just or necessary.

COUNT III

NOW COME the Plaintiffs, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership, by its attorneys as aforesaid, and for Count III of its Complaint against the VILLAGE OF NEW LENOX state as follows:

1 through 27. That Plaintiffs repeat and reallege Paragraphs 1 through 27 of Count I as Paragraphs 1 through 27, inclusive, of this Count III as if fully set forth herein.

28. That the action of the Defendant, VILLAGE OF NEW LENOX, in forbidding, under and by virtue of the New Lenox Zoning Ordinance, the establishment in any industrial district in New Lenox of an asphalt plant and in failing to provide any zoning district in which such uses may be established as a matter of right bears no real or substantial relationship to the public health, safety, morals and public welfare; and deprives the Plaintiff of the highest and best use of its property; destroys the value thereof; confiscates the said Plaintiff's property without due process of law and without benefiting the public thereby; and is arbitrary, capricious, unreasonable, unnecessary, and in violation of the municipal zoning enabling statutes of the State of Illinois, and is, therefore, void and unenforceable.

29 through 32. That Plaintiffs repeat and reallege Paragraphs 31 through 34 of Count I, respectively, as Paragraphs 29 through 32 of this Count III as if fully set forth herein.

WHEREFORE, Plaintiffs, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership, prays as follows:

A. That this Court enter judgment determining and decreeing that the said zoning ordinance of the VILLAGE OF NEW LENOX is invalid and void insofar as it forbids the use of the subject property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs.

B. That this Court determine and decree that the Plaintiffs, and anyone acting through, with or under them, shall have the right to use the above-described property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs in the manner hereinabove set forth.

C. That this Court issue its writ of injunction restraining the VILLAGE OF NEW LENOX, and its officers, agents and employees from enforcing or endeavoring to enforce the provisions of the Village of New Lenox Zoning Ordinance so as to forbid the use of the subject property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs.

D. That this Court issue a writ of injunction restraining the VILLAGE OF NEW LENOX, its officers, agents and employees from interfering in any manner with the Plaintiffs or any person claiming by, through or under the Plaintiffs in the use and development of the said subject property for an asphalt plant as hereinabove more fully described.

E. That the Plaintiffs have such other and further relief in this matter as the Court deems just or necessary.

FERRO BROTHERS PARTNERSHIP,
an Illinois General Partnership

By: _____

DONALD L. WENNLUND & ASSOCIATES
1234 North Cedar Road
New Lenox, Illinois 60451
(815) 485-4447

APPENDIX G

[Filed August 13, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

AMENDMENT TO COMPLAINT

NOW COME the Plaintiffs, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership, by their attorneys, Donald L. Wennlund & Associates, and hereby files an amendment to the complaint heretofore filed by adding thereto Count IV as follows:

COUNT IV

Plaintiffs, by their attorneys as aforesaid, for their Count IV against the Defendant herein, state as follows:

1. That the Defendant, VILLAGE OF NEW LENOX, is a body politic and corporate duly existing under and by virtue of the Statutes of Illinois.

2. That the Plaintiff, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, was and is now the owner of record of certain property in the Village of New Lenox, Will County, Illinois, located approximately 1,500 feet east of Gougar Road, bounded on the south and east by Interstate Route 80 and on the north by the Michigan Central Railroad and legally described as follows:

> The East 10 acres of the following described property: That part of the West half of Section 17, Township 35 North, Range 11 East of the Third Principal Meridian, New Lenox Township, Will County, Illinois lying Southerly of the Michigan Central Railroad, lying Northerly of F.A.I. Route 80 Highway and except that part previously conveyed to the State of Illinois by Document No. 1013791 and except the North 312 feet of the South 1929.77 feet of the West 743.78 feet of said Section.

and set forth on Exhibit "C" attached hereto and made a part hereof.

3. That the entire beneficial interest of said land trust is owned by Plaintiff, FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership.

4. That there is now in full force and effect in the Village of New Lenox a zoning ordinance passed and approved July 15, 1970, and thereafter amended from time to time, a true and correct copy of the I-1 Industrial District provisions and special use provisions are attached hereto and by reference made a part hereof as Exhibit "A".

5. That under the aforesaid zoning ordinance, the subject property is classified in the I-1 Industrial District with a nonconforming use for mining gravel.

6. That the subject property is triangular in shape, is approximately ten (10) acres in size, is located approximately 1,500 feet east of Gougar Road, and is bounded on the north and east by the Michigan Central Railroad right-of-way and on the south and east by the F.A.I. Route 80 right-of-way with dimensions on the west line of 969.53 feet, along the Michigan Central Railroad right-of-way of 948.86 feet, and along the F.A.I. Route 80 right-of-way of 1023.92 feet, and is screened from surrounding properties by the railroad embankment on the north and east, F.A.I. Route 80 on the south and east, and by being 1,500 feet off Gougar Road on the west.

7. That the Comprehensive Plan of the Village of New Lenox designates the subject site for industrial uses and Gougar Road is designated as the truck route through and around the Village.

8. That if developed as proposed by Plaintiffs, the subject property would be improved with a plant for the processing and production of asphalt, material storage facilities and an office and garage building, all to be used in the production of asphalt.

9. That the Defendant, VILLAGE OF NEW LENOX, and its building commissioner refused to issue a building permit for the construction and operation upon the property of a plant for processing and production of asphalt, material storage facilities and an office and garage building on the basis that such use was not a permitted use under Section 6.22 of said Zoning Ordinance.

10. That the Plaintiffs thereafter filed an application for a special use permit for the construction and operation of a plant for processing and production of asphalt, material storage facilities and an office and garage building, pursuant to the provisions of Section 6.23 of said Zoning Ordinance which was denied by Defendant, VILLAGE OF NEW LENOX, on the basis that the Plaintiffs' appli-

cation was for a use which is not a similar and compatible use to those allowed as permitted uses in the I-1 District, and, therefore, a use totally prohibited from the industrial classification of said Ordinance.

11. That Section 6.22 of the Zoning Ordinance of the Village of New Lenox setting forth permitted industrial uses states as follows:

6.22 Uses Permitted

No land shall be used or occupied and no building, structure, or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Ordinance, for other than one or more of the following specified uses:

1. Industrial Type Uses, *such as but not limited to*:

   (a) All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings . . . (emphasis added).

   (b) Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

   (c) Printing, publishing, or lithography establishments.

   (d) Railroad freight yards.

12. That Section 6.23 of the Zoning Ordinance of the Village of New Lenox sets for the special uses which are permitted in the I-1 Industrial District as follows:

6.23 Special Uses Permitted

The following uses shall be permitted only if specifically authorized by the Zoning Board of Appeals as allowed in Section 12.

1. Similar and Compatible Uses to those allowed as "permitted uses" in this district.
2. Drive-in banking facilities.
3. Planned Unit Development.
4. Residence of the proprietor, caretaker, or watchman, when located on the premises of the commercial or industrial use.
5. Radio and television towers.
6. Filling of holes, pits or lowlands with noncombustible material free from refuse and/or food wastes.
7. Mining, loading and hauling of sand, gravel, topsoil or other aggregate or minerals, including equipment, buildings or structures for screening, crushing, mixing, washing or storage, provided that:
   (a) No open pit or shaft is less than two hundred (200) feet from any public road.
   (b) All buildings or structures for the screening, crushing, washing, mixing or storage are located not less than two hundred (200) feet from any property line.
   (c) The borders of the property adjacent to any district other than an industrial district are fenced with a solid fence or wall at least six (6) feet in height.
   (d) A plan of development of the reclamation of the land is provided as part of the application for special use. The plan of development shall be accompanied by a written agreement between the owner or his agent and the Village of New Lenox, and a performance bond in an amount equal to the cost of the reclamation of the land as set forth in the Development Plan.

13. That Section 6.26 of the Zoning Ordinance of the Village of New Lenox setting out prohibited industrial uses states as follows:

6.26 Prohibited Uses

All uses not expressly authorized in Sections 6.22, 6.23, 6.24 and 6.25 *including but not limited to*:

1. Residential uses, except as a special use.
2. Drive-in restaurants.
3. Wrecking, dismantling, or automotive salvage yard. (emphasis added).

14. That the language set forth in Section 6.22, namely, "industrial type uses *such as, but not limited to*," and the language contained in Section 6.26, "prohibited uses, all uses not expressly authorized in Sections 6.22, 6.23 and 6.25 *including but not limited to*," permits the Village Building Inspector to determine which uses are industrial type uses, which are permitted under the ordinances, and to determine what uses are prohibited because they are, "such as, but not limited to," and therefore delegates legislative power to the Village Building Commission to determine when building or zoning permits or certificates should be issued for a particular use upon an industrial zoned land within the Village.

15. That such language is unconstitutionally vague, and that it requires a man of ordinary intelligence to guess at what is a permitted or prohibited use, or one for which a special use permitted must be obtained.

WHEREFORE, Plaintiffs pray as follows:

A. That this Court enter a judgment determining and decreeing that the said zoning ordinance of the Village of New Lenox is unconstitutionally vague as it applies to industrial uses within the Village, and that it constitutes an unconstitutional delegation of legislative authority in a Village employee.

B. That this Court determine and decree that the Plaintiffs and anyone acting through, with or under them, shall

have the right to use the above-described property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs in the manner hereinabove set forth.

C. That this Court enter its Order enjoining and restraining the VILLAGE OF NEW LENOX, and its officers, agents and employees from enforcing or endeavoring to enforce the provisions of the Village of New Lenox Zoning Ordinance so as to forbid the use of the subject property for an asphalt plant of the type proposed to be operated and maintained by Plaintiffs.

D. That this Court enter its Order enjoining and restraining the VILLAGE OF NEW LENOX, its officers, agents and employees from interfering in any manner with the Plaintiffs or any person claiming by, through or under the Plaintiffs in the use and development of the said subject property for an asphalt plant as hereinabove more fully described.

E. That the Plaintiffs have such other and further relief in this matter as the Court deems just or necessary.

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership

By: /s/ _____
One of Its Attorneys

DONALD L. WENNLUND & ASSOCIATES
1234 North Cedar Road
New Lenox, Illinois 60451
(815) 485-4447

APPENDIX H

[Filed October 18, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

ANSWER TO COUNT IV

NOW COMES, the Defendant, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, by and through its attorneys, MURPHY, TIMM, LENNON, SPESIA & AYERS, and in Answer to Count IV of Plaintiff's Complaint, states as follows:

COUNT IV

1. Admits the allegations contained in Paragraph 1.

2. Neither admits or denies the allegations contained in Paragraph 2 with respect to Plaintiff, UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, being the owner of record to the real estate therein described for the reason that it has insufficient knowledge thereof to form a belief therein and demands strict proof thereof.

3. Neither admits nor denies the allegations contained in Paragraph 3 with respect to Plaintiff, FERRO BROTHERS PARTNERSHIP, holding a beneficial interest to the land trust therein referred to for the reason that it has insufficient knowledge thereof to form a belief therein and demands strict proof thereof.

4. Admits that a Village of New Lenox Zoning Ordinance was at all times herein relevant in full force and effect. Further answering, Defendant denies the allegation that Plaintiff has attached a true and correct copy of same.

5. Denies the allegations that the subject property is classified in the I-1 Industrial District with a nonconforming use for mining gravel and, further answering, states that the subject property is zoned I-1 Limited Industrial District.

6. Neither admits nor denies the allegations contained in Paragraph 6 with respect to the size and shape of the subject property, its boundaries, and the surrounding properties, for the reason that it has insufficient knowledge thereof to form a belief therein, and demands strict proof thereof. Defendant denies the conclusionary allegations that said property is screened from surrounding properties.

7. Admits the allegations contained in Paragraph 7 that the comprehensive plan of the village of New Lenox designates the subject site for Limited Industrial Uses,

but denies the remaining conclusionary allegations contained in this Paragraph.

8. Neither admits nor denies the allegations contained in Paragraph 8 for the reason that it has insufficient knowledge thereof to form a belief therein and demands strict proof thereof.

9. Denies the allegations contained in Paragraph 9.

10. Denies the allegations contained in Paragraph 10.

11. Admits that permitted uses for the I-1 Limited Industrial District are found in Section 10-6-2-2 of the New Lenox Municipal Code, and further answering, states that this entire Section is not recited in Paragraph 11.

12. Admits that the special uses permitted for the I-1 Limited Industrial District are found in Section 10-6-2-3 of the New Lenox Municipal Code.

13. Admits that prohibited uses within the I-1 Limited Industrial District are as enumerated in Section 10-6-2-6 of the New Lenox Municipal Code.

14. Denies the allegations contained in Paragraph 14.

15. Denies the allegations contained in Paragraph 15.

WHEREFORE, the Defendant, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, prays for the entry of judgment in its favor and against Plaintiffs, with costs assessed against Plaintiffs.

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation

/s/ MURPHY, TIMM, LENNON,
SPESIA & AYERS
Its Attorneys

Murphy, Timm, Lennon,
Spesia & Ayers
Five East Van Buren Street
Joliet, Illinois 60431
(815) 726-4311

APPENDIX I

[Filed October 8, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs in the above-entitled cause and moves, pursuant to Section 2-1005 of the Code of Civil Procedure, that this Honorable Court enter its Summary Judgment in favor of the Plaintiffs and against the Defendant as to Count IV of Plaintiffs' Complaint, and in support thereof states as follows:

1. That there are no genuine issues as to any material facts set out in Count IV of Plaintiffs' Complaint, and Plaintiffs are entitled to a judgment as a matter of law in its favor as to said Count IV of Plaintiffs' Complaint.

2. That at all times material to the allegations of said Count IV, there is and was in full force and effect in the Village of New Lenox, County of Will, a zoning ordinance passed and approved July 15, 1970, and thereafter amended from time to time; a true and correct copy of the I-1 Limited Industrial District provision contained in Section 6 of said ordinance is attached hereto as Exhibit "A".

3. That pursuant to the provisions of Section 12.61, Plaintiffs on or about July 12, 1984 applied to the Building Commissioner of the Defendant for a building permit which, pursuant to Section 12.62, is also deemed to be a zoning certificate, for the construction upon its land within the Defendant village limits which is zoned by Defendant as I-1 as described in Count IV of Plaintiffs' Complaint, of a plant for the processing and production of asphalt, material storage, office and garage building.

4. That Section 12.61 of said Zoning Ordinance provides as follows:

> 12.61 Certificate Required
>
> No building or structure shall be erected, constructed, reconstructed, enlarged, moved, or structurally altered, nor shall any excavation or grading for any building or structure be done, without a building permit. No building permit, and no other permit pertaining to the use of land, buildings, or structures, shall be issued by any employee of the Village unless the proposed building or structure and the proposed use thereof comply with all the provisions of this Ordinance, nor shall any such permit be issued unless the application for such permit has affixed to it or stamped thereon a certificate of the Building Commissioner certifying such compliance. Any permit or zoning certificate issued in conflict with the provisions of this Ordinance shall be void.

A true and exact copy of Section 12 of said Ordinance is attached hereto as Exhibit "B".

5. That the Building Commissioner of the Defendant is vested with the ministered duty to detemine in his sole discretion whether the proposed use of any land complies with all the provisions of said Zoning Ordinance as provided in said Section 12.61.

6. That the Defendant's Building Commissioner refused to issue to Plaintiff a building permit or zoning certificate for the use sought upon Plaintiffs' I-1 zoned land on the basis that such use was not a permitted use under Section 6.22 of said Defendant's Zoning Ordinance.

7. That Section 6.22 of Defendant's Zoning Ordinance sets forth permitted industrial uses as follows:

> 6.22 Uses Permitted
>
> *No land shall be used* or occupied and no building, structure, or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Ordinance, *for other than one or more of the following specified uses*:
>
> 1. Industrial Type Uses, *such as but not limited to*:
>
> (a) All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.
>
> (b) Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.
>
> (c) Printing, publishing, or lithography establishments.
>
> (d) Railroad freight yards. (Emphasis added)

8. That Section 6.26 of Defendant's Zoning Ordinance sets out prohibited industrial uses as follows:

6.26 Prohibited Uses

All uses not expressly authorized in Sections 6.22, 6.23, 6.24, and 6.25 *including but not limited to*:

1. Residential uses, except as a special use.

2. Drive-in restaurants.

3. Wrecking, dismantling, or automotive salvage yard. (Emphasis added)

9. That pursuant to the provisions of Section 12.61, the Defendant's Building Commissioner, in his sole discretion and without any standards, rules or guidelines, has the authority to determine which industrial type uses land within the Defendant Village may be put by the language of said Ordinance in Section 6.22, "Industrial Type Uses, such as but not limited to:" as the Defendant Building Commissioner determines whether the use sought is permitted even though such use is not specified in Section 6.22.

10. That Section 6.26 of Defendant's Zoning Ordinance which provides as follows:

6.26 Prohibited Uses

All uses not expressly authorized in Sections 6.22, 6.23, 6.24, and 6.25 *including but not limited to*:

1. Residential uses, except as a special use.

2. Drive-in restaurants.

3. Wrecking, dismantling, or automotive salvage yard. (Emphasis added)

permits the Defendant's Building Commissioner, in his sole discretion without any standards, rules or guidelines to determine what uses are not authorized by said Section 6.22 as a "such as" use and therefore an included use, since the industrial uses permitted in the I-1 District are not limited to those specifically set forth in said Section 6.22, leaving the Defendant Building Commissioner as the sole determiner of what uses are "Prohibited Uses" in the I-1 district under Section 6.26.

11. That said Sections 12.6, 6.22 and 6.26 constitute an unlawful and unconstitutional delegation of legislative power to an administrative officer, the Building Commissioner, who can determine what the zoning law shall be, and to whom it shall be applied without the imposition by Defendant Village of any standards, rules, or guidelines in that said sections authorize the Building Commissioner to determine what uses are permitted, and what uses are prohibited in industrial districts in the Defendant, VILLAGE OF NEW LENOX.

12. That the language of Section 6.22:

> "No land shall be used or occupied and no building, structure, or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Ordinance, *for other than one or more of the following specified uses*:
>
> 1. Industrial Type Uses, such as but not limited to:"

and the language of Section 6.26:

> "Prohibited Uses
>
> All uses not expressly authorized in Sections 6.22, 6.23, 6.24 and 6.25 *including but not limited to:*"

are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and guess as to what uses are permitted and what uses are prohibited in I-1 districts in the Defendant, VILLAGE OF NEW LENOX.

WHEREFORE, Plaintiff prays that this Honorable Court enter its Summary Judgment in favor of the Plaintiffs and against the Defendant, in accordance with the prayer of Count IV of Plaintiffs' Complaint, including the entry of its order upon the Defendant, VILLAGE OF NEW LENOX, to forthwith issue its building permit for the construction and operation of a plant for the processing and production of asphalt, material storage facilities, and an office and garage building.

UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership

By: /s/ _____

DONALD L. WENNLUND & ASSOCIATES
1234 North Cedar Road
New Lenox, Illinois 60451
(815) 485-4447

APPENDIX J

[Filed November 4, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

-vs-.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Now comes the Defendant, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, by its attorneys, Murphy, Timm, Lennon, Spesia & Ayers, and pursuant to Section 2-1005 of the Illinois Civil Practice Law, Ch. 110, §2-1005 moves this Court for entry of a Summary Judgment in favor of this Defendant and against the Plaintiff as to Count IV of Plaintiff's Complaint. As grounds therefore Defendant states as follows:

1. Plaintiff's Complaint, by its Count IV, attempts to allege that certain provisions of the VILLAGE OF NEW LENOX Zoning Ordinance are unconstitutional and as a basis therefore alleges, *inter alia*, That the Defendant, VILLAGE OF NEW LENOX, and its building commissioner refused to issue a building permit for the construction and operation upon the property of a plant for the processing and production of asphalt, material storage facilities and an office and garage building on the basis that such use was not a permitted use under Section 6.22 of said Zoning Ordinance.

2. That the Plaintiff's allege, in their Motion for Summary Judgment, they did make application for a building permit to the building commissioner for the Defendant, VILLAGE OF NEW LENOX, on or about July 12, 1984 and that said application complied with the provisions of the New Lenox Zoning Ordinance; And further allege, in paragraph 6 of said Motion for Summary Judgment, that the Defendant's building commissioner did refuse to issue a building permit to the Plaintiff on the basis that such use was not a permitted use under the Defendant's Zoning Ordinance.

3. That the depositions of the attorney for the Plaintiffs, Donald L. Wennlund, and the depositions of the President of the VILLAGE OF NEW LENOX, Dennis Valy, and the deposition of its municipal attorney, Douglas F. Spesia, reveal that, indeed, no application for a building permit was made to the Village of New Lenox under any provision of its Zoning Ordinance. (See deposition of Dennis Valy, Douglas F. Spesia, and Donald L. Wennlund attached as Exhibits A, B, and C respectively.)

4. That the counsel for the Plaintiffs, Donald L. Wennlund, in his discovery deposition stated as follows:

a. That at no time during his course of dealing with the VILLAGE OF NEW LENOX did he submit a written application for a building permit on behalf of the Plaintiffs in this cause. (See pages 5, 6, 7, 11, 16 and 17, Wennlund deposition.)

b. That at no time relevant hereto did Attorney Wennlund on behalf of his clients submit any written plans for buildings to any agent of the Defendant. (See pages 6, 9 and 18, Wennlund deposition.)

c. That contrary to the requirements and provisions of the VILLAGE OF NEW LENOX Zoning Ordinance Attorney Wennlund never submitted, on behalf of his clients, any certificate of a registered architect or structural engineer and/or affidavits of the builder with regard to the proposed construction and use of the property. (See page 10, Wennlund deposition.)

5. That at no time relevant hereto did the Plaintiff, or its counsel, Donald L. Wennlund, make any applications, oral or written, to the building commissioner for the Defendant, VILLAGE OF NEW LENOX. (See Page 11, Wennlund deposition.)

6. That the deposition of municipal attorney, Douglas F. Spesia, reveals that in late spring, early summer 1984, he conversed generally, at various times, with Mayor Dennis Valy and Attorney Donald L. Wennlund about an application for special use permit for a proposed asphalt plant. At no time was he ever asked about a building permit application. (See pages 8, 14 and 15, Spesia deposition.)

7. That the deposition of New Lenox Mayor, Dennis Valy, reveals he was approached by Attorney Wennlund in late spring, early summer, 1984 about a proposed asphalt plant. It was his understanding that the questions to him, by Attorney Wennlund, related to the current zoning and use as an asphalt plant. He does not recall the word "building permit" ever being used. (Pages 5, 6 and 7, Valy deposition.) The procedure provided for in the Village Zoning Ordinance requires that a written duplicate application be made to the building commissioner. (pages 11 and 15, Valy deposition.) Nevertheless, he never received such a written application from Attorney Wennlund. (Page 12, Valy deposition.)

8. At no time did the building commissioner for the Village of New Lenox in 1984, ever receive an application for a building permit from Plaintiffs relative to an asphalt plant. Further, nor did he rule on, accept or deny any such application. (See attached Affidavit of John Brent.)

9. The Village records relative to building permit applications do not reveal such an application for a proposed asphalt plant by Plaintiffs. (See attached Affidavit of Brian Phillips.)

10. As Plaintiffs made no application for a building permit as alleged in the Motion for Summary Judgment, the same was not and could not have been denied by the Defendant, VILLAGE OF NEW LENOX, as is suggested in Paragraph 9 of Count IV, as amended to the Complaint.

11. That Section 10-12-7 of the New Lenox Zoning Ordinance provides, in pertinent part, that no building shall be erected without a building permit. Section 10-12-4 further provides that an application for building permit shall be filed in duplicate with the building commissioner and shall include plans drawn to scale, information describing the existing and proposed use and a certificate of a registered architect or structural engineer, or affidavit of owner. (See attached Exhibit D, Section 10-12-4 of the New Lenox Zoning Ordinance.)

12. That Section 10-12-7 of the New Lenox Zoning Ordinance provides, in pertinent part, that an applicant may appeal the denial of an application for a building permit by filing a written notice of appeal with the Village clerk. Said Section 10-12-7 provides that the appeal shall be decided by the Zoning Board of Appeals after a hearing, and that this decision is a final administrative determination subject to judicial review in accordance with Illinois statutes. (See attached Exhibit E, Section 10-12-7 of the New Lenox Zoning Ordinance.)

13. As a result of the Plaintiffs' failure to file such an appeal, even if it is assumed that an application for a building permit was made, the Plaintiffs have failed to ex-

haust their administrative remedies and have no standing to maintain Count IV of the Amendment to the Complaint or the Motion for Summary Judgment based thereon.

14. Assuming arguendo that Plaintiffs did make an application for building permit, and that the same was denied, the New Lenox Zoning Ordinance, contrary to Plaintiffs' allegations, does not delegate the power and authority to determine permitted uses under its provisions to the building commissioner. Said Ordinance specifically reserving said power and authority to the Village Board of Trustees under Section 10-12-3 of the New Lenox Zoning Ordinance. (See attached Exhibit D, Section 10-12-3 of the New Lenox Zoning Ordinance.)

15. That Plaintiffs proposed use of the subject property in question for operation of a plant for processing and production of asphalt, material storage facilities, office and garage building is not a prohibited use under the Zoning Ordinance of New Lenox, that use being provided for as a "special use" under Section 10-6-2-3(a), (g) under zoning classification of I-1 and, thus, is not otherwise prohibited by any other provisions of the Defendant's zoning ordinance.

16. That contrary to Plaintiffs' suggestions, the provisions of the New Lenox Zoning Ordinance referred to in its Motion for Summary Judgment are not so "incomplete, vague, indefinite and uncertain that men of ordinary intelligence must guess at their meaning and guess what uses are permitted and what uses are prohibited." Further, said allegation is not an averment of fact, but is conclusionary in nature and therefore should not be considered by this Court in its determination as to the propriety of the Motion for Summary Judgment.

17. That under Section 2-1005 of the Civil Practice Act (Ill. Rev. Stat., 1983, ch. 110, Par. 1005) summary judgment should be granted only if the pleadings, affidavits and depositions on file reveal that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. (See also *Kroll v. Sugar*

Supply Corporation, 116 Ill.App.3d 969, 71 Ill. Dec. 396, 452 N.E.2d 649 (1983); *Murphy v. Urso*, 88 Ill.2d 444, 463-64, 58 Ill.Dec. 828, 430 N.E.2d 1079 (1981). In the instant case, the facts contained in the record herein clearly establish, as a matter of law, that the movant, VILLAGE OF NEW LENOX, is entitled to judgment in its behalf and against the Plaintiff with regard to Count IV.

WHEREFORE, the Defendant, VILLAGE OF NEW LENOX, a Municipal Corporation, respectfully requests that this Court grant its Motion for Summary Judgment and enter judgment in its favor and against the Plaintiffs on Count IV of the Plaintiffs' Complaint.

MURPHY, TIMM, LENNON,
SPESIA & AYERS

/s/ MURPHY, TIMM, LENNON,
SPESIA & AYERS
Attorneys for Defendants

Murphy, Timm, Lennon,
Spesia & Ayers
Five East Van Buren Street
Joliet, Illinois 60431
(815) 726-4311

[EXHIBITS OMITTED IN PRINTING]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

AFFIDAVIT

I, JOHN BRENT, being first duly sworn on oath deposes and states:

1. That on or about July, 1984, I was the Building Commissioner for the Village of New Lenox.
2. That in my capacity as Building Commissioner I accepted applications for building permits within the Village of New Lenox.
3. That on or about July, 1984, I did not receive an application for building permit from Plaintiffs relative to an asphalt plant on Gougar Road, nor did I review, inspect, rule on, accept or deny any such application.

4. That I have reviewed my personal records and the records of the Village of New Lenox and I have not been able to find any such application for an asphalt plant on Gougar Road.
5. Further Affiant sayeth not.

/s/ JOHN BRENT

[Notarization omitted in printing]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

AFFIDAVIT

I, BRIAN PHILLIPS, being first duly sworn on oath deposes and states:

1. That I am presently the Village Administrator for the Village of New Lenox and that I was in this position on or about July, 1984.
2. That I do not recall an application for a building permit for an asphalt plant being made for Gougar Road, in New Lenox, during July, 1984, or at any time prior thereto.
3. That on or about October 9, 1985, I inspected the Village records relative to building permit applications and I have not been able to find any such ap-

plication for an asphalt plant on Gougar Road as proposed by the Plaintiffs.

4. That the only application received by the Village from the Plaintiffs relative to an asphalt plant on Gougar Road is a special use application.
5. Further Affiant sayeth not.

/s/ BRIAN PHILLIPS

[Notarization omitted in printing]

APPENDIX K

[Filed November 1, 1985]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Now comes the Defendant, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, by its attorneys, MURPHY, TIMM, LENNON, SPESIA & AYERS, and for its response to Plaintiffs' Motion for Summary Judgment in its favor and against this Defendant as to Count IV of Plaintiffs' Complaint states as follows:

1. Plaintiffs' Complaint by its Count IV does not allege that an application for building permit was made to the Village of New Lenox or any of its agents. Count IV does allege in Paragraph 9 thereof:

> "That the Defendant, VILLAGE OF NEW LENOX, and its building commissioner refused to issue a building permit for the construction and operation upon the property of a plant for processing and production of asphalt. . ."

2. That said allegation is not an averment of fact, but is conclusionary in nature and requires the Court, by inference to reach the conclusion that an application for a building permit was in fact made.

3. That Plaintiffs, in Paragraph 3 of its Motion for Summary Judgment states that on or about July 12, 1984, the Plaintiffs did apply "to the Building Commissioner of the Defendant for a building permit. . ."

4. That the depositions of the attorney for the Plaintiffs, Donald L. Wennlund, and the depositions of the President of the Village of New Lenox, Dennis Valy, and the deposition of its municipal attorney, Douglas F. Spesia, reveal that, indeed, no application for a building permit was made to the Village of New Lenox under any provision of its zoning ordinance. (See depositions of Dennis Valy, Douglas F. Spesia, and Donald L. Wennlund attached as Exhibits A, B, and C respectively.)

5. That the counsel for the Plaintiffs, Donald L. Wennlund, in his discovery deposition stated as follows:

a. That at no time during his course of dealing with the Village of New Lenox did he submit a written application for a building permit on behalf of the Plaintiffs in this cause. (See pages 5, 6, 7, 11, 16 and 17, Wennlund deposition.)

b. That at no time relevant hereto did Attorney Wennlund on behalf of his clients submit any written plans for buildings to any agent of the Defendant. (See pages 6, 9 and 18, Wennlund deposition.)

c. That contrary to the requirements and provisions of the Village of New Lenox Zoning Ordinance Attorney Wennlund never submitted, on behalf of his clients, any certificate of a registered architect or structural engineer and/or affidavits of the builder with regard to the proposed construction and use of the property. (See page 10, Wennlund deposition.)

6. That at no time relevant hereto did the Plaintiffs, or its counsel, Donald L. Wennlund, make any applications, oral or written, to the Building Commissioner for the Defendant, Village of New Lenox. (See Page 11, Wennlund deposition.)

7. That the deposition of municipal Attorney, Douglas F. Spesia, reveals that in late Spring, early Summer 1984, he conversed generally at various times with Mayor Dennis Valy and Attorney Donald L. Wennlund about an application for special use permit for a proposed asphalt plant. At no time was he ever asked about a building permit application and he never was given a copy of a written building permit application. (See Pages 8, 14 and 15, Spesia deposition.)

8. That the deposition of New Lenox Mayor, Dennis Valy, reveals he was approached by Attorney Wennlund in late Spring, early Summer 1984, about a proposed asphalt plant. It was his understanding that the questions to him, by Attorney Wennlund, related to the current zoning and use as an asphalt plant. He does not recall the word "building permit" ever being used. (Pages 5, 6, and 7, Valy deposition.) The procedure provided for in the Village Zoning Ordinance requires that a written duplicate application be made to the Building Commissioner. (Pages 11 and 15, Valy deposition.) Nevertheless, he never received such a written application from Attorney Wennlund (Page 12, Valy deposition.)

9. At no time did the Building Commissioner for the Village of New Lenox in 1984, ever receive an application for building permit from Plaintiffs relative to an asphalt plant. Further, nor did he rule on, accept or deny

any such application. (See attached Affidavit of John Brent.)

10. The Village records relative to building permit applications do not reveal such an application for a proposed asphalt plant by Plaintiffs. (See attached Affidavit of Brian Phillips.)

11. As Plaintiffs made no application for a building permit as alleged in the Motion for Summary Judgment, the same was not and could not have been denied by the Defendant, Village of New Lenox, as is suggested in Paragraph 9 of Count IV, as amended to the Complaint.

12. That Section 10-12-7 of the New Lenox Zoning Ordinance provides in pertinent part that no building shall be erected without a building permit. Section 10-12-4 further provides that an application for building permit shall be filed in duplicate with the Building Commissioner and shall include plans drawn to scale, information describing the existing and proposed use and a certificate of a registered architect or structural engineer, or affidavit of owner. (See attached Exhibit D, Section 10-12-4 of the New Lenox Zoning Ordinance.)

13. That Section 10-12-7 of the New Lenox Zoning Ordinance provides in pertinent part that an applicant may appeal the denial of an application for a building permit by filing a written notice of appeal with the Village Clerk. Said Section 10-12-7 provides that the appeal shall be decided by the Zoning Board of Appeals after a hearing, and that this decision is a final administrative determination subject to judicial review in accordance with Illinois Statutes. (See attached Exhibit E, Section 10-12-7 of the New Lenox Zoning Ordinance.)

14. As a result of the Plaintiffs' failure to file such an appeal, even if it is assumed that an application for a building permit was made, the Plaintiffs have failed to exhaust their administrative remedies and have no standing to maintain Count IV of the Amendment to the Complaint or the Motion for Summary Judgment based thereon.

15. Assuming arguendo that Plaintiffs did make an application for building permit, and that the same was denied, the New Lenox Zoning Ordinance, contrary to Plaintiffs' allegations, does not delegate the power and authority to determine permitted uses under its provisions to the Building Commissioner. Said Ordinance specifically reversing said power and authority to the Village Board of Trustees under Section 10-12-3 of the New Lenox Zoning Ordinance. (See attached Exhibit D, Section 10-12-3 of the New Lenox Zoning Ordinance.)

16. That Plaintiffs proposed use of the subject property in question for operation of a plant for processing and production of asphalt, material storage facilities, office and garage building is not a prohibited use under the Zoning Ordinance of New Lenox, that use being provided for as a "special use" under Section 10-6-2-3(a), (g) under zoning classification of I-1 and, thus, is not otherwise prohibited by any other provisions of the Defendant's Zoning Ordinance.

17. That contrary to Plaintiffs' suggestions, the provisions of the New Lenox Zoning Ordinance referred to in its Motion for Summary Judgment are not so "incomplete, vague, indefinite and uncertain that men of ordinary intelligence must guess at their meaning and guess what uses are permitted and what uses are prohibited." Further, said allegation is not an averment of fact, but is conclusionary in nature and therefore should not be considered by this Court in its determination as to the propriety of the Motion for Summary Judgment.

18. That under Section 1-1005 of the Civil Practice Act (Ill. Rev. Stat., 1983, ch. 110, p.2-105) summary judgment should be granted only if the pleadings, affidavits and depositions on file reveal that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. (See also *Kroll v. Sugar Supply Corporation*, 116 Ill. App. 3d 969, 72 Ill. Dec. 396, 452 NE 2d 649 (1983); *Murphy v. Urso*, 88 Ill. 2d 444, 463-64, 58 Ill. Dec. 828, 430 NE 2d 1079 (1981).) In the instant

case, Plaintiffs have failed to support the conclusions of fact made, and set forth, in Count IV and the Motion for Summary Judgment with any affidavit, excerpt from deposition, or other written exhibit. As set forth in this Response, the pleadings made in Plaintiffs' Complaint and Motion, herein specifically denied by Defendant, do not establish as a matter of law that the movant is entitled to judgment.

WHEREFORE, the Defendant, VILLAGE OF NEW LENOX, a Municipal Corporation, respectfully requests that this honorable Court deny the Plaintiffs' Motion for Summary Judgment.

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation

/s/ MURPHY, TIMM, LENNON,
SPESIA & AYERS
Its Attorneys

Murphy, Timm, Lennon,
Spesia & Ayers
Five East Van Buren Street
Joliet, Illinois 60431
(815) 726-4311

[EXHIBITS OMITTED IN PRINTING]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

AFFIDAVIT

I, JOHN BRENT, being first duly sworn on oath deposes and states:

1. That on or about July, 1984, I was the Building Commissioner for the Village of New Lenox.
2. That in my capacity as Building Commissioner I accepted applications for building permits within the Village of New Lenox.
3. That on or about July, 1984, I did not receive an application for building permit from Plaintiffs relative to an asphalt plant on Gougar Road, nor did I review, inspect, rule on, accept or deny any such application.

4. That I have reviewed my personal records and the records of the Village of New Lenox and I have not been able to find any such application for an asphalt plant on Gougar Road.
5. Further Affiant sayeth not.

/s/ JOHN BRENT

[Notarization omitted in printing]

State of Illinois
County of Will—ss.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
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No. 85 CH 116

UNION NATIONAL BANK & TRUST COMPANY, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963 and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Plaintiffs,

vs.

VILLAGE OF NEW LENOX, an Illinois Municipal Corporation,

Defendant.

AFFIDAVIT

I, BRIAN PHILLIPS, being first duly sworn on oath deposes and states:

1. That I am presently the Village Administrator for the Village of New Lenox and that I was in this position on or about July, 1984.
2. That I do not recall an application for a building permit for an asphalt plant being made for Gougar Road, in New Lenox, during July, 1984, or at any time prior thereto.
3. That on or about October 9, 1985, I inspected the Village records relative to building permit applications and I have not been able to find any such ap-

plication for an asphalt plant on Gougar Road as proposed by the Plaintiffs.

4. That the only application received by the Village from the Plaintiffs relative to an asphalt plant on Gougar Road is a special use application.

5. Further Affiant sayeth not.

/s/ BRIAN PHILLIPS

[Notarization omitted in printing]

APPENDIX L

CHAPTER 6
INDUSTRIAL DISTRICTS[1]

10-6-1: **PURPOSE:** The Industrial District regulations are intended to govern the location, intensity and method of development of the industrial areas of New Lenox. The regulations are designed to provide for the grouping together of industries that are compatible to one another and that are not objectionable to the community as a whole. The regulations preserve lands for industrial and allied uses and prohibit the intrusion of residential and other noncompatible uses into the industrial area. The performance of the industrial uses is regulated by establishing standards for the external effects of noise, smoke, vibration and other potential nuisances. All industrial uses are contained in the I-1 Limited Industrial District.

10-6-2: **I-1 LIMITED INDUSTRIAL DISTRICT:**

10-6-2-1: **DESCRIPTION OF DISTRICT:** The I-1 Limited Industrial District is intended to provide lands for development by industrial firms that have high standards of performance and that can locate in close proximity to residential and business uses. The District regulations are designed to permit the operations of most manufacturing, wholesaling and warehousing activities with adequate protection to adjacent district uses and sufficient control of external effects to protect one industry from another. Some retail uses are permitted that service the industrial uses within the industrial area or that do not depend upon the direct visits of retail customers.

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[1] See Section 9-1-6 of this Code for building regulations.

10-6-2-2: **USES PERMITTED:** No land shall be used or occupied and no building, structure or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Title, for other than one or more of the following specified uses:

A. Industrial type uses, such as but not limited to:

1. All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.

2. Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

3. Printing, publishing or lithography establishments.

4. Railroad freight yards.

B. Wholesale and warehouse uses, such as but not limited to:

1. Direct selling establishments, where products are stored and distributed.

2. Wholesale and warehouse establishments that deal in commodities which are the product of a use permitted in the I-1 District.

3. Wholesale establishment.

4. Warehouse.

5. Storage building.

C. Commercial Uses:

1. Service retail businesses, for the convenience of persons and firms in the industrial district such as but not limited to:

Automobile service station.

Bank, not including drive-in facilities.

Barber shop.

Currency Exchange.

Delicatessen.

Doctor's, surgeon's and/or physician's office.

Dry cleaner.

Hotel and/or motel.

Medical clinic.

Meeting hall.

Office building.

Restaurant.

2. Business establishments:

Advertising signs.

Automobile diagnostic center.

Automobile repair shop.

Bottled gas dealer.

Bottling works.

Building services and supplies.

Cartage, express and parcel delivery establishments.

Commercial testing laboratory.

Contractor's yard.

Fuel oil dealer.

Furniture repair and reupholstery.

Lumber yard.

Motor vehicle dealer.

Monument works.

Tire retreading and repair shop.

Truck terminal.

D. Public, quasi-public and governmental buildings and facilities, such as but not limited to:

1. Animal pounds and shelters.

2. Essential services, gas regulator stations, telephone exchanges, electric substations.
3. Hospital.
4. Office building.
5. Public service or Municipal garage.
6. Public utility establishment.
7. Sewerage treatment plant.
8. Transit and transportation facilities.
9. Vocational school.
10. Water filtration plant.
11. Water reservoir.

10-6-2-3: **SPECIAL USES PERMITTED:** The following uses shall be permitted only if specifically authorized by the Zoning Board of Appeals[1] as allowed in Chapter 12 of this Title:

A. Similar and compatible uses to those allowed as "permitted uses" in this District.

B. Drive-in banking facilities.

C. Planned unit development.

D. Residence of the proprietor, caretaker or watchman, when located on the premises of the commercial or industrial use.

E. Radio and television towers.

F. Filling of holes, pits or lowlands with noncombustible material free from refuse and/or food wastes.

G. Mining, loading and hauling of sand, gravel, topsoil or other aggregate or minerals, including equipment, buildings or structures for screening, crushing, mixing, washing or storage; provided that:

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[1] See Title 2, Chapter 3 of this Code.

1. No open pit or shaft is less than two hundred feet (200′) from any public road.

2. All buildings or structures for the screening, crushing, washing, mixing or storage are located not less than two hundred feet (200′) from any property line.

3. The borders of the property adjacent to any district other than an industrial district are fenced with a solid fence or wall at least six feet (6′) in height.

4. A plan of development of the reclamation of the land is provided as part of the application for special use. The plan of development shall be accompanied by written agreement between the owner or his agent and the Village, and a performance bond in an amount equal to the cost of the reclamation of the land as set forth in the development plan.

10-6-2-4: **TEMPORARY PERMIT USES PERMITTED:** Upon application to the Zoning Board of Appeals, review of the recommendation by the Zoning Board of Appeals, and issuance by the Village Board of a permit therefor, the following uses may be operated as temporary uses:

A. Temporary building or yard for construction materials and/or equipment, both incidental and necessary to construction in the zoning district. Each permit shall specify the location of the building or yard and the area of permitted operation. Each such permit shall be valid for a period of not more than six (6) calendar months and shall not be renewed for more than four (4) successive periods at the same location.

B. Temporary office, both incidental and necessary for the sale or rental of real property. Each permit shall specify the location of the office and the area of permitted operation. Each such permit shall be valid for a period of not more than one year and shall not be renewed for more than five (5) successive periods at the same location.

C. Real estate subdivision sign not to exceed one hundred (100) square feet for each face. Signs shall be nonilluminated. Each permit shall specify the location of the sign. Each such permit shall be valid for a period of not more than one year and shall not be renewed for more than five (5) successive periods at the same location.

10-6-2-5: **ACCESSORY USES PERMITTED:** Accessory uses, buildings or other structures and devices customarily incidental to and commonly associated with a permitted use or special use may be permitted, provided they are operated and maintained under the same ownership, on the same parcel, and do not include structures or features inconsistent with the permitted use or special use.

10-6-2-6: **PROHIBITED USES:** All uses not expressly authorized in Sections 10-6-2-2; 10-6-2-3; 10-6-2-4 and 10-6-2-5 of this Chapter, including but not limited to:

A. Residential uses, except as a special use.

B. Drive-in restaurants.

C. Wrecking, dismantling or automotive salvage yard.

10-6-2-7: **SITE AND STRUCTURE REQUIREMENTS:**

A. Minimum Lot Area: A separate ground area, of not less than ten thousand (10,000) square feet shall be designated, provided and continuously maintained for each structure or land containing a permitted or special use.

B. Minimum Lot Width: A minimum lot width of one hundred feet (100') shall be provided for each lot used for a permitted or special use.

C. Front Yard: All structures shall be set back at least fifty feet (50′) from the front lot line. (Corner lots, see Section 10-7-4D of this Title)

D. Side Yard: All structures shall be set in from the side lot line a distance of not less than ten feet (10′) on the least side, with the sum of the two (2) sides not less than twenty five feet (25′).

E. Rear Yard: All structures shall be set in a distance of not less than fifty feet (50′) from the rear lot line.

F. Maximum Height: No structure shall exceed two and one-half (2½) stories or thirty five feet (35′) in height when within two hundred feet (200′) of any residential district. Otherwise no structure shall exceed in height one-half (½) the distance measured to the center line of any street or residential district line.

G. Floor Area Ratio: Not to exceed 2.0.

H. Maximum Lot Coverage: Not more than sixty percent (60%) of the lot area may be occupied by buildings and structures, including accessory buildings.

10-6-2-8: **SPECIAL PROVISIONS:**

A. Parking Requirements: In accordance with the applicable regulations set forth in Chapter 10 of this Title.

B. Sign Requirements: In accordance with the applicable regulations set forth in Chapter 11 of this Title.

C. Outdoor Sales: All outdoor sales space shall be provided with a permanent durable and dustless surface, and shall be graded and drained as to dispose of all surface water.

D. Outdoor Storage: All outdoor storage facilities for fuel, raw materials and products within two hundred feet (200′) of a residential district, shall be enclosed by a fence, wall or plant materials adequate to conceal such facilities from adjacent properties and the public right of way.

E. Enclosure of Use: All industrial operations shall take place within completely enclosed buildings, unless otherwise specified.

10-6-3: **PERFORMANCE STANDARDS:** Any use established in the I-1 District after the effective date hereof shall be so operated as to comply with the performance standards governing: (1) noise; (2) vibration; (3) smoke and particulate matter; (4) toxic matter; (5) odorous matter; (6) fire and explosive hazards; (7) glare; and (8) radiation hazards; as hereinafter set forth in this Section.

Uses already established on the effective date hereof shall be permitted to be altered, enlarged, expanded or modified; provided, that the additions or changes comply with said performance standards.

10-6-3-1: **NOISE:** For the purpose of measuring the intensity and frequency of sound, the sound level meter, the octave band analyzer and the impact noise analyzer shall be employed.

The flat network and the fast meter response of the sound level meter shall be used. Sounds of very short duration, as from forge hammers, punch presses and metal shears which cannot be measured accurately with the sound level meter shall be measured with the impact noise analyzer. Octave band analyzers calibrated in the Preferred Frequencies (United States of America Standard S1.6-1960, Preferred Frequencies for Acoustical Measurement) shall be used in the table headed "Octave Band, Preferred Frequencies". Octave band analyzers calibrated with the pre-1960 octave bands (U.S.A.S. Z24.10-1953, Octave Band Filter Set) shall be used with the tables headed "Octave Band, Pre-1960".

The following uses and activities shall be exempt from the noise level regulations:

A. Noises not directly under the control of the property user.

B. Noises emanating from construction and maintenance activities between seven o'clock (7:00) A.M. and nine o'clock (9:00) P.M. Such activities are those which are non-routine operations accessory to the primary activities and which are temporary in nature, or conducted infrequently.

C. The noises of safety signals, warning devices and emergency pressure relief valves which are used infrequently.

D. Transient noises of moving sources such as automobiles, trucks, airplanes and railroads.

The decibel values specified for residence districts shall be reduced by five (5) decibels between the hours of seven o'clock (7:00) P.M. and seven o'clock (7:00) A.M.

The generation of noise shall not exceed the decibel limits prescribed below:

(See following page for Sound Level Table)

MAXIMUM PERMITTED SOUND LEVELS

Octave Band Pre-1960 (Cycles Per Second)	Decibels (Re .0002 Microbar) Neighboring Lot	Residence District
20 - 75	79	72
75 - 150	74	67
150 - 300	66	59
300 - 600	59	52
600 - 1,200	53	46
1,200 - 2,400	47	40
2,400 - 4,800	41	34
Above 4,800	39	32

Octave Band Preferred Frequencies (Cycles Per Second)	Neighboring Lot	Residence District
31.5	83	76
63	78	71
125	72	65
250	64	57
500	57	50
1,000	51	45
2,000	46	39
4,000	41	34
8,000	38	32

Impact noises measured on an impact noise analyzer shall not exceed the following peak intensities:

	Neighboring Lot	Residence District
Overall Peak	86	80

10-6-3-2: **VIBRATION:** In the I-1 District, no activity or operation shall cause or create earthborne vibrations in excess of the displacement values given below.

Measurements shall be made at or beyond the adjacent lot line or the nearest residence district boundary line,

as described below. Vibration displacements shall be measured with an instrument or complement of instruments capable of simultaneously measuring in three (3) mutually perpendicular directions. The maximum vector shall be less than the vibration displacement permitted.

The maximum permitted displacements shall be permitted in each district by the following formula:

$$D = \frac{K}{f}$$

where D = displacement in inches

K = a constant to be determined by reference to the folowing tables

f = the frequency of the vibration transmitted through the ground, cycles per second

The maximum earth displacement permitted at the points described below shall be determined by use of the formula in the preceding paragraph and the appropriate K constant shown in Table 1.

TABLE 1

Values of K to be Used in Vibration Formula

Location	K
In any neighboring lot	
Continuous	0.008
Impulsive	0.015
Less than 8 pulses per 24-hour period	0.037
In any residence district	
Continuous	0.003
Impulsive	0.006
Less than 8 pulses per 24-hour period	0.015

10-6-3-3: **SMOKE AND PARTICULATE MATTER:**

A. For the purpose of grading the density or equivalent opacity of smoke, the Ringelmann Chart described in the U. S. Bureau of Mines Information Circular 8333 (May, 1967) shall be employed. The emission of smoke or particulate matter of a density or equivalent opacity equal to or greater than No. 2 on the Ringelmann Chart is prohibited at all times except as otherwise provided hereinafter.

B. Dust and other types of air pollution borne by the wind from such sources as storage areas, yards, roads and the like within lot boundaries shall be kept to a minimum by appropriate landscaping, paving, oiling, fencing, wetting or other acceptable means.

C. No operation shall cause or allow to be emitted into the open air from any process or control equipment or to pass any convenient measuring point in a breeching or stack, particulate matter in the gases that exceeds thirty-five hundredths (0.35) grains per standard cubic foot (70° F. and 14.7 psia) of gases during any one hour.

D. Particulate matter loadings in pounds per acre described below shall be determined by selecting a continuous four (4) hour period which will result in the highest average emission rate.

E. The emission of smoke having a density or equivalent opacity in excess of Ringelmann No. 1 is prohibited. However, for two (2) minutes in any four (4) hour period, smoke up to and including Ringelmann No. 2 shall be permitted.

F. The rate of emission of particulate matter from all vents and stacks within the boundaries of any lot shall not exceed five-tenths (0.5) pounds per hour per acre of lot area.

10-6-3-4: **TOXIC MATTER:** The release of airborne toxic matter shall not exceed one-thirtieth (1/30) of the "Threshold Limit Values for 1967" as adopted by the American Conference of Governmental Industrial Hygienists, when measured at any point beyond the lot line, either at ground level or habitable elevation, whichever is more restrictive. Concentrations shall be measured and calculated as the highest average that will occur over a continuous twenty four (24) hour period.

If a toxic substance is not listed, the applicant shall satisfy the Village that the proposed level will be safe and not detrimental to the public health or injurious to plant and animal life.

10-6-3-5: **ODOROUS MATTER:** When odorous matter is released from any operation, activity or use, the concentration of such odorous materials shall not exceed the odor threshold when measured beyond the lot line, either at ground level or habitable elevation.

10-6-3-6: **FIRE AND EXPLOSION HAZARDS:**

A. Detonable Materials: The storage, utilization or manufacture of materials or products which decompose by detonation is limited to five (5) pounds.

Such materials shall include but are not limited to: all primary explosives such as lead azide, lead styphnate, fulminates and tetracene; all high explosives such as TNT, RDX, HMS, PETN, and picric acid; propellants and components thereof, such as dry nitrocellulose, black powder, boron hydrides, hydrazine and its derivatives; pyrotechnics and fireworks such as magnesium powder, potassium chlorate and potassium nitrate; blasting explosives such as dynamite and nitroglycerine; unstable organic compounds such as acetylides, tetrozoles and ozonides; unstable oxidizing agents such as perchloric acid, perchlorates and hydrogen peroxide in concentrations greater than

thirty five percent (35%); and nuclear fuels, fissionable materials and products, and reactor elements such as Uranium 235 and Plutonium 239.

B. Flammable Solids: In the I-1 District the storage, utilization or manufacture of solid materials or products ranging from incombustible to moderate burning is permitted.

The storage, utilization or manufacture of solid materials or products ranging from free or active burning to intense burning is permitted, provided either of the following conditions is met:

1. Said materials or products shall be stored, utilized or manufactured within completely enclosed buildings having no less than two (2) hour fire resistant exterior walls and protected with an automatic fire extinguishing system, or

B) 2. Said materials, if stored outdoors, will be no less than fifty feet (50') from the nearest lot line.

C. Flammable Liquids and Gases: The storage, utilization or manufacture of flammable liquids shall be permitted in accordance with the following table, exclusive of storage of finished products in original sealed containers, which shall be unrestricted. Above ground flammable liquid and gas storage tanks shall not be less than fifty feet (50') from all lot lines. Flammable liquids and gases in original sealed containers of fifty five (55) gallons' liquid capacity or less may be stored or utilized without restriction.

TABLE 2

Total Capacity of Flammable Materials Permitted
(In Gallons)

	Above Ground (Within Enclosed Building)	Underground
Materials having a closed cup flash point over 187° F. but less than 300° F.	20,000	100,000
From and including 105° F. to and including 187° F.	10,000	100,000
Materials having a closed cup flash point of less than 105° F.	3,000	100,000

When flammable gases are stored, utilized or manufactured and measured in cubic feet, the quantity in cubic feet at standard tempersature and pressure shall not exceed thirty (30) times the quantities listed above.

10-6-3-7: **GLARE:** Any operation or activity producing glare at night shall be conducted so that direct and indirect illumination from the source of light on the lot shall not cause illumination in excess of one-half (½) foot candle when measured in a residence district. Flickering or intense sources of light shall be controlled or shielded so as not to cause a nuisance across lot lines.

10-6-3-8: **RADIATION HAZARDS:**

A. Release Outside Property Lines: In the I-1 District, the release of radioactive materials or the emission of ionizing radiation outside of property lines shall

be in accordance with the rules and regulations of the State of Illinois.[1]

B. Unsealed Radioactive Materials: In the I-1 District, unsealed radioactive materials shall not be manufactured, utilized or stored (except when such materials are stored in a fireproof container at or below ground level).

* * * * *

[1] S.H.A. ch. 111½, secs. 211 et seq.

CHAPTER 12
ZONING ADMINISTRATION AND ENFORCEMENT

* * * * *

10-12-3: VILLAGE BOARD OF TRUSTEES:

A. General Duties: The Village Board of Trustees shall establish the standards, procedures and content of this Title and shall reserve certain matters of final decision to itself and delegate certain other matters to other individuals or agencies. Decisions of the Village Board shall be subject to judicial review as the law may provide.

B. Jurisdiction:

1. To decide amendments to this Title after public hearing and report by the Plan Commission.

2. To decide on special use permits after public hearing and report by the Plan Commission.

3. To decide on planned unit developments after public hearing and report by the Plan Commission.[1]

4. To make appointments to the Zoning Board of Appeals and/or Plan Commission.

5. To decide all other matters required by this Title.

[1] See Chapter 9 of this Title.

10-12-4: **ZONING CERTIFICATES:**

A. Certificate Required: No building or structure shall be erected, constructed, reconstructed, enlarged, moved or structurally altered, nor shall any excavation or grading for any building or structure be done, without a building permit. No building permit, and no other permit pertaining to the use of land, buildings or structures shall be issued by any employee of the Village unless the proposed building or structure and the proposed use thereof comply with all the provisions of this Title, nor shall any such permit be issued unless the application for such permit has affixed to it or stamped thereon a certificate of the Building Commissioner certifying such compliance. Any permit or zoning certificate issued in conflict with the provisions of this Title shall be void.

B. Application: Every application for a building permit shall also be deemed an application for a zoning certificate, shall be made in duplicate in such form as the Building Commissioner may from time to time provide, and shall include:

1. Plans in duplicate, drawn to scale, showing the actual shape and dimensions of the lot to be built upon; the sizes and locations on the lot of buildings and structures already existing, if any; the location and dimensions of the proposed building or alteration; the location and dimensions of all proposed off-street parking and loading spaces and accessways thereto; and such other matters as the Building Commissioner may deem necessary to determine conformance with this Title.

2. Information describing the existing and proposed use of each building and land area on the lot; the number of families or dwelling units proposed to be accommodated; and such other matters as the Building Commissioner may deem necessary to determine conformance with this Title.

3. A certificate of a registered architect or a registered structural engineer licensed by the State of Illinois, or, if no architect or engineer was employed, affidavits of the owner and builder, that the proposed construction and the proposed use thereof comply with all the provisions of this Title, or stating the extent of noncompliance. Where the use requires compliance with manufacturing performance standards herein set forth, the certification of a professional engineer, licensed in the State of Illinois and having an expertise in such standards, shall be required.

C. Action by Building Commissioner: Within fifteen (15) days after the receipt of an application for a zoning certificate, the Building Commissioner shall issue the certificate, provided all applicable provisions of this Title are complied with, or the Building Commissioner shall refuse to issue a zoning certificate and shall advise the applicant in writing of the reasons for the refusal. If the Building Commissioner fails to act within fifteen (15) days, the applicant may then file with the Building Commissioner a written demand that action be taken immediately. If the Building Commissioner fails to act within three (3) days after receipt of said written demand, the applicant may treat the application as denied and may appeal from such denial to the Zoning Board of Appeals in the manner and subject to the standards of Section 10-12-7 of this Title.

D. Period of Validity: No building permit shall be valid for a period longer than one hundred eighty (180) days from the date of its issuance unless the work authorized by it is substantially under way by the end of said period.

10-12-5: **CERTIFICATE OF OCCUPANCY:**

A. Certificate Required: It shall be unlawful to use or occupy or permit the use or occupancy of any building or premises, or both, or part thereof hereafter created, erected, changed, converted or wholly or partly altered or enlarged in its use or structure until a certificate of occupancy shall have been issued therefor by the Building Commissioner. No such certificate shall be issued unless the proposed use or occupancy complies with all the provisions of this Title. Any certificate of occupancy issued in conflict with the provisions of this Title shall be void.

B. Application: Every application for a building permit shall also be deemed an application for a certificate of occupancy. Where no building permit is required, an application for a certificate of occupancy shall be made to the Building Commissioner in such form as he may from time to time provide.

C. Issuance: No certificate of occupancy for a building, structure or portion thereof, constructed after the effective date hereof, shall be issued until construction has been completed and the premises inspected and certified to be in conformity with the plans and specifications upon which the zoning certificate was based. Pending issuance of a regular certificate, a temporary certificate may be issued, to be valid for a period not to exceed six (6) months from its date, during the completion of any addition or during partial occupancy of the premises. A certificate of occupancy shall be issued, or written notice shall be given to the applicant stating the reasons why a certificate cannot be issued, not later than fifteen (15) days after the Building Commissioner is notified in writing that the building or premise is ready for occupancy.

D. Period of Validity: No certificate of occupancy shall be valid for a period longer than ninety (90) days from the date of its issuance unless the use of occupancy authorized by it shall have been established within such period.

* * * * *

10-12-7: **APPEALS:**

A. Authority: The Zoning Board of Appeals shall hear and decide appeals from an administrative order, requirement or determination under this Title.

B. Scope of Appeals: An appeal, in which it is alleged that there is error in any decision made by the Building Commissioner under this Title, may be taken to the Board by any person or governmental agency aggrieved by such decision or by any department, officer, board or bureau of the Village. Such an appeal shall be taken, within such time as shall be prescribed by the Board by rule, by filing with the Village Clerk a notice of appeal in such form as the Board may provide by rule. The Building Commissioner shall, without delay, forward to the Board a copy of the notice of appeal together with all of the papers constituting the record upon which the decision appealed from was made.

C. Stay of Proceedings: An appeal shall stay all proceedings in furtherance of the decision appealed unless the Building Commissioner certifies to the Board, after the notice of the appeal has been filed with him, that by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property, in which case the proceedings shall not be stayed unless by a restraining order, which may be granted by the Board or by a court of record on applications, on notice to the Building Commissioner and on due cause shown.

D. Hearing: The Board shall select a reasonable time and place for the hearing of the appeal and give notice thereof to the parties, including the appellant, the Building Commissioner, and any other affected party who has requested in writing that he be so notified.

E. Decisions: The Board shall render a written decision on the appeal within a reasonable time, but in no event more than sixty (60) days after the filing of

the notice of appeal, and shall promptly forward a copy of the decision to the parties. The Board may affirm or may, upon the concurring vote of four (4) members, reverse, wholly or in part, or modify, the decision of the Building Commissioner, as in its opinion ought to be done, and to that end shall have all the powers of the Building Commissioner. All decisions, after hearing, of the Zoning Board of Appeals on appeals from an administrative order, requirement, decision or determination of the Building Commissioner shall, in all instances, be final administrative determinations and shall be subject to judicial review only in accordance with applicable Illinois Statutes.[1]

10-12-8: **SPECIAL USE PERMITS:**

A. Purpose: This Title is based upon the division of the Village into districts, within which the uses of land, and the use and bulk of buildings and structures, are substantially uniform. It is recognized, however, that there are special uses which, because of their unique characteristics, can only be properly classified in any particular district or districts upon consideration in each case of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location. Such special uses fall into two (2) categories:

1. Uses publicly operated or traditionally affected with a public interest, and

2. Uses entirely private in character, but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property, public facilities, or the Village as a whole.

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[1] S.H.A. ch. 24, sec. 11-13-13.

B. Authority: Special use permits may be granted by the Village Board, but only in accordance with the requirement hereinafter set forth.

C. Application and Notice of Hearing: An application for a special use permit shall be filed in duplicate with the Village Clerk, who shall forward a copy of the application to the Plan Commission without delay. The application shall be in such form, contain such information, and be accompanied by such plans, as the Plan Commission may by rule require. The Plan Commission shall hold a public hearing on such application not more than sixty (60) days after its filing. Notice of the time and place of such hearing shall be published at least once, not more than thirty (30) days nor less than fifteen (15) days before the hearing, in a newspaper of general circulation in the Village. The published notice may be supplemented by such additional form of notice as the Commission may provide by rule.

D. Report: Within sixty (60) days after the close of the hearing, unless the applicant shall have consented to a longer period, the Commission shall transmit to the Village Board a written report giving its findings and recommendations for action to be taken by the Village Board on the application. The report shall include any recommended conditions or restrictions to be imposed upon the premises benefited by the special use permit.

E. Standards: No special use permit may be granted unless:

1. The proposed use is designated by this Title as a special use in the district in which the use is to be located.

2. The proposed use will comply with all applicable regulations in the district in which the use is to be located.

3. The location and size of the proposed use, the nature and intensity of the operation involved in or conducted in connection with it, the size of the site in relation to it, and the location of the site with respect to streets giving access to it are such that it will be in harmony with the appropriate and orderly development of the district in which it is located.

4. The location, nature and height of buildings, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not unreasonably hinder or discourage the appropriate development and use of adjacent land and buildings.

5. Parking areas will be of adequate size for the particular use, properly located and suitably screened from adjoining uses, and the entrance and exit drives will be laid out so as to prevent traffic hazards and nuisances.

6. The proposed use will not cause substantial injury to the value of other property in the neighborhood.

7. Conditions in the area have substantially changed, and at least one year has elapsed since any denial by the Village Board of any prior application for a special use permit that would have authorized substantially the same use of all or part of the site.

The Village Board shall impose such conditions and restrictions upon the premises benefited by a special use permit as may be necessary to assure compliance with the above standards, to reduce or minimize the effect of such permit upon other properties in the neighborhood, and to better carry out the general intent of this Title. Failure to comply with such conditions or restrictions shall constitute a violation of this Title.

F. Effective Period: No special use permit shall be valid for a period longer than one hundred eighty (180) days from the date it is granted unless a build-

ing permit or certificate of occupancy is obtained within such period and the erection or alteration of a building is started or the use is commenced within such period. The Village Board may grant one extension of this period, valid for no more than one hundred eighty (180) days, upon written application and good cause shown, without notice or hearing. If any special use is abandoned, or is discontinued for a continuous period of one year, the special use permit for such use shall become void, and such use shall not thereafter be re-established unless a new special use permit is obtained.

G. Decisions: The Village Board, upon report of the Plan Commission and without further public hearing, may grant or deny any proposed special use in accordance with applicable Statutes of the State of Illinois,[1] or may refer it back to the Plan Commission for further consideration.

H. Planned Unit Development: A planned unit development shall be granted a special use. The standards, requirements and procedures granted shall be in accordance with Chapter 9 of this Title.

* * * * *

[1] S.H.A. ch. 24, secs. 11-13-1 et seq.

APPENDIX M

Illinois Revised Statutes 1985,
ch. 24, par. 11-13-13

§ 11-13-13. All final administrative decisions of the board of appeals under this Division 13 shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, and all amendments and modifications thereof,[1] and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2]

Amended by P.A. 82-783, Art. XI, § 54, eff. July 13, 1982.

[1] Chapter 110, ¶ 3-101 et seq.
[2] Chapter 110, ¶ 3-101.

(3)

No. 87-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation,

Petitioner,

v.

UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case contains the following inaccuracies and omissions. Petitioner's App. L obviously demonstrates that not all industrial uses specified therein must be conducted wholly within enclosed buildings. Other uses such as railroad freight yards and truck terminals are clearly permitted.

With respect to Count IV of Respondents' complaint, Petitioner's App. G, it should be noted that this Count was a direct attack on the Petitioner's zoning ordinance on its face. It alleged that the zoning ordinance violated state and federal constitutions in that its language is unconstitutionally vague and that it constitutes an unconstitutional delegation of legislative authority to a village employee.

The Appellate Court so ruled in its ruling in favor of this Respondent, a cross-appellant before the Appellate Court, and the Illinois Supreme Court denied the Petitioner's petition for leave to appeal. The Appellate Court also affirmed the entry by the trial court of a judgment in favor of the Plaintiffs.

REASONS FOR DENYING THE WRIT

The petition fails to set forth any matter or grounds as to why this cause should be reviewed by this Court. Rule 17 of the Rules of Practice of the Supreme Court of the United States clearly provides that certiorari will be granted only when there are special and important reasons therefor. Petitioner sets forth no special or important reasons for this cause to be reviewed by this Court and in fact none exist. This cause involved no important questions of federal law, no federal court of appeals decisions, and no state court of last resort has decided a federal question in a way in conflict, with the decision of another such state court or federal court of appeals. The Illinois Appellate Court for the Third District has not decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court.

This cause involved a local zoning ordinance challenged both on the grounds that it violated State of Illinois and United States Constitutions as it was applied to Respondents' property and on its face by its vague language and as an unconstitutional delegation of legislative authority.

There were no new or novel issues presented for review or raised in the Petition. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on the same basis.

The Petitioner incorrectly perceived the basis of not only Count IV, but also the Appellate Court's ruling which held the zoning ordinance to be violative of both the Illinois and United States Constitutions on its face, in addition to its holding affirming the trial court's decision that the ordinance is unconstitutional as it applied to the Respondents' property in that it violated both state and federal constitutional provisions.

I.

THE DECISION OF THE APPELLATE COURT IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

The Petitioner in fact reveals in its Petition that the Appellate Court relied on the decisions of this Court and applied the rules for determining the unconstitutionally vague provisions of the zoning ordinance.

Count IV of Respondents' Complaint attacked the constitutionality of Petitioner Village of New Lenox's industrial zoning ordinance on its face as a matter of law (App. G-1). The basis of the attack are twofold: that the language of the ordinance is so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at its meaning and guess as to what uses are permitted and what uses are prohibited in the I-1 zon-

ing district; and that the ordinance which delegates to the Petitioner's building commissioner the power to determine which uses are permitted and which are prohibited without any standards, rules or guidelines constitutes an unconstitutional delegation of legislative authority.

Section 10-12-4 (App. L-17) Petitioner Village of New Lenox's zoning ordinance provides as follows:

> Section 10-12-4 Certificate Required
>
> No building or structure shall be erected, constructed, reconstructed, enlarged, moved, or structurally altered, nor shall any excavation or grading for any building or structure be done, without a building permit. No building permit, and no other permit pertaining to the use of land, buildings, or structures, shall be issued by an employee of the Village unless the proposed building or structure and the proposed use thereof comply with all the provisions of this Ordinance, nor shall any such permit be issued unless the application for such permit has affixed to it or stamped thereon a certificate of the Building Commissioner certifying such compliance. Any permit or zoning certificate issued in conflict with the provisions of this Ordinance shall be void.

This section delegates to the building commissioner of Petitioner, Village of New Lenox, the power to determine in his sole discretion whether the proposed use of any land complies with all the provisions of the zoning ordinance including whether or not a use is permitted under Section 10-6-2-2 (App. L-2).

> Section 10-6-2-2 Uses Permitted
>
> *No land shall be used* or occupied and no building, structure, or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Ordinance, *for other than one or more of the following specified uses*:

1. Industrial Type Uses, *such as but not limited to*:

(a) All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.

(b) Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

(c) Printing, publishing or lithography establishments.

(d) Railroad freight yards. (Emphasis added)

The building commissioner also determines what uses are prohibited under Section 10-6-2-6 (App. L-6).

Section 10-6-2-6 Prohibited Uses

All uses not expressly authorized in Sections 6.22, 6.23, 6.24, and 6.25 *including but not limited to*:

1. Residential uses, except as a special use.

2. Drive-in restaurants.

3. Wrecking, dismantling, or automotive salvage yard. (Emphasis added)

The objectionable language which grants to the building commissioner unfettered discretion appears in both sections. Section 10-6-2-2 Uses Permitted Industrial Type Uses, "*such as but not limited to*:"; Section 10-6-2-6 prohibits certain uses "*including but not limited to*:". It is the building commissioner who decides what uses are also permitted in an industrial zone under Section 10-6-2-2 because the list of uses described therein is not complete and he determines what unlisted other uses are permitted. He also has the power to add to the list of prohibited uses because the listed prohibited uses are specifically not complete "including but not limited to:". It is therefore the

building commissioner who determines what the zoning law shall be. He can decide what other uses are permitted or prohibited and grant or refuse a permit or zoning certificate under Section 10-12-4.

Men of ordinary intelligence must necessarily guess as to what other uses are permitted and what other uses are prohibited. The language of the ordinance is so incomplete and indefinite as to render it unconstitutionally vague. The ordinance cannot be uniformly applied because the ordinance grants the discretion to the building commissioner. A law vesting discretionary power in an administrative official without properly defining the terms under which his discretion is to be exercised is void as an unlawful delegation of legislative power. *Krol v. County of Will*, 38 Ill. 2d 587, 233 N.E.2d 417, 420 (1968).

The test to determine whether an ordinance is unconstitutionally vague is well established, "whether men of ordinary intelligence must guess at its meaning". *Queenwood East Sheltered Care Home, Ltd. v. Village of Morton*, 94 Ill. App. 3d 51, 418 N.E.2d 472, 476, 49 Ill. Dec. 618 (3rd Dist. 1981). As to what other industrial uses are permitted and as to what other uses are prohibited, men of ordinary intelligence must guess.

II.

THE APPELLATE COURT CORRECTLY FOUND THAT THE PETITIONER'S VILLAGE ORDINANCE WAS DEVOID OF ANY STANDARDS OR CRITERIA TO DETERMINE WHAT USE IS A PERMITTED, SPECIAL OR PROHIBITED USE.

The list of uses which are permitted is left totally open-ended as are the uses which are to be specifically prohibited by expanding each such list of uses to include other nonspecified uses without any criteria or standards.

It then goes on to permit a special use which is similar and compatible to an incomplete list of not only permitted uses but prohibited uses. Special uses may be flexible but similar and compatible to what? The undefined uses permitted under Section 10-6-2-2A are not even limited to those conducted wholly within enclosed buildings. The Appellate Court's decision is not contrary to existing case law.

CONCLUSION

For the foregoing reasons this cause should not be reviewed by this Court.

Respectfully submitted,

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